Slip Op. 07–50

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, GOLD EAST PAPER (JIANGSU) COMPANY, LIMITED, and GLOBAL PAPER SOLUTIONS, INCORPORATED, Plaintiffs, v. UNITED STATES, Defendant, and NEWPAGE CORPORATION, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL–CIO–CLC Defendants-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 07–00010

[Defendant's Motion to Dismiss for lack of jurisdiction is granted.]

March 29, 2007

Vinson & Elkins, LLP (*William H. Barringer, Daniel L. Porter, Valerie Ellis, Robert DeFrancesco, Matthew P. McCullough*, and *David Hardin*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*John J. Todor*) for Defendant.

Carrie L. Owens, Senior Attorney, U.S. Department of Commerce, Import Administration, Office of Chief Counsel, of counsel, for Defendant.

King & Spalding, LLP (*Gilbert B. Kaplan, Joseph W. Dorn, Jeffrey M. Telep, Cris R. Revaz*, and *Stephen A. Jones*) for Defendant-Intervenor NewPage Corporation.

Stewart and Stewart (*Geert M. De Prest*) for Defendant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, ALF–CIO–CLC.

OPINION

Carman, Judge: Two motions are currently before this Court.[1] On one side, Plaintiffs, Government of the People's Republic of China, Gold East Paper (Jiangsu) Company, Ltd., and Global Paper Solu-

[1] Defendant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC did not participate briefing these motions.

tions, Inc., request a preliminary injunction to enjoin the Department of Commerce ("Commerce") from conducting a countervailing duty investigation of coated free sheet paper from the People's Republic of China ("PRC"). (Mot. for TRO & Prelim. Inj. & to Advance & Consol. Trial on the Merits ("Pls.' Mot. for Prelim. Inj.") 1.) Plaintiffs allege that Commerce is not authorized to apply countervailing duty law to products from non-market economies ("NMEs") like the PRC and therefore should be enjoined from continuing the countervailing duty investigation it initiated. (Mem. of Law in Supp. of Pls.' Mot for TRO & for a Prelim. Inj. (Pls.' Prelim. Inj. Mem.) 1–3.) On the other side, Defendant, the United States ("Government"), requests on behalf of Commerce that this Court dismiss Plaintiffs' action for lack of jurisdiction.[2] (Def.'s Mot. to Dismiss 1.) Because this Court lacks jurisdiction to hear the claims raised by Plaintiffs, this Court grants Defendant's Motion to Dismiss and does not address Plaintiffs' Motion for a Preliminary Injunction.

BACKGROUND

Commerce designated the PRC as an NME, which is "any foreign country [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise," 19 U.S.C. § 1677(18) (2000). In fact, in the Notice of Initiation of a parallel antidumping investigation of coated free sheet paper from the PRC, Commerce noted that it still considers the PRC to be an NME.

> In previous investigations, [Commerce] has determined that the PRC is an NME. In accordance with section 771(18)(C)(i) of the [Tariff] Act [of 1930], the presumption of NME status remains in effect until revoked by [Commerce]. The presumption of NME status for the PRC has not been rejected by [Commerce] and remains in effect for purposes of the initiation of this investigation.

Coated Free Sheet Paper from Indonesia, the People's Republic of China, and the Republic of Korea, 71 Fed. Reg. 68,537, 68,540 (Dep't Commerce Nov. 27, 2006) (initiation of antidumping investigation) (internal citations omitted).

Defendant-Intervenor, NewPage Corporation ("NewPage"), is a domestic paper manufacturer. In October 2006, NewPage filed a petition with Commerce alleging that "manufacturers, producers, or exporters of coated free sheet paper (CFS) in the [PRC] . . . received

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[2] Defendant-Intervenor, NewPage Corporation ("NewPage"), also filed a motion to dismiss for lack of jurisdiction. Because NewPage's and the Government's motions to dismiss and supporting memoranda are similar, this Court will only refer to Defendant's Motion to Dismiss except in instances where the two motions differ.

countervailable subsidies . . . and that such imports are materially injuring, or threatening material injury to, an industry in the United States." *Coated Free Sheet Paper from the People's Republic of China, Indonesia, and the Republic of Korea*, 71 Fed. Reg. 68,546 (Dep't Commerce Nov. 27, 2006) (initiation of countervailing duty investigation). Commerce reviewed NewPage's petition for sufficiency and initiated a countervailing duty investigation of coated free sheet paper from the PRC on November 27, 2006. *Id.* at 68,547–48. In conjunction with the countervailing duty investigation, Commerce requested public comment on the issue of whether the countervailing duty law should be applied to NMEs. *Application of the Countervailing Duty Law to Imports From the People's Republic of China*, 71 Fed. Reg. 75,507 (Dep't Commerce Dec. 15, 2006) (request for comment) ("*Request for Comment*").

For more than twenty years prior to the initiation of the countervailing duty investigation of coated free sheet paper from the PRC, Commerce declined to apply countervailing duty law to NMEs.[3] In *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), the Court of Appeals for the Federal Circuit ("CAFC") sustained Commerce's decision in that case not to apply countervailing duty law to the NMEs at issue. *Id.* at 1318. Since *Georgetown Steel*, Commerce has repeatedly dismissed petitions filed against products from countries designated as NMEs. *See, e.g.*, *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018, 24,019 (Dep't Commerce Jun. 5, 1992) (final negative countervailing duty determination) ("[W]e have determined that the PRC fans industry is not a [market-oriented industry]. As a result, we determine that the countervailing duty law cannot be applied to the PRC fan industry. Therefore, [Commerce] is issuing final negative determinations in these proceedings."); *Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China ("PRC")*, 57 Fed. Reg. 877, 878 (Dep't Commerce Jan. 9, 1992) (initiation of countervailing duty investigation) (declining to "initiate an upstream subsidies investigation of the steel and chemical suppliers to the PRC lug nuts industry" because "there is a significant degree of state control in these sectors"). Commerce noted in the Request for Comment that "[t]his is the first CVD investigation involving the PRC since 1991" and acknowledged that "[t]he initiation of the present investigation requires that [Commerce] review its long-standing policy of not applying the countervailing duty law to

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[3] However, Commerce has applied the countervailing duty law to "market-oriented" industries within an NME. *See, e.g.*, *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018 (Dep't Commerce Jun. 5, 1992) (final negative countervailing duty determination) (explaining the test Commerce applies to determine if a particular industry within an NME is "market-oriented").

NMEs, such as the PRC." *Request for Comment*, 71 Fed. Reg. at 75,507.

Soon after Commerce published notice of the initiation of the countervailing duty investigation of coated free sheet paper from the PRC, Plaintiffs filed suit in this Court requesting both a temporary restraining order and a preliminary injunction to enjoin Commerce from continuing the countervailing duty investigation pending the court's decision in this case. (*See* Pls.' Mot. for Prelim. Inj. 5.) The Government countered with a motion to dismiss the action for lack of jurisdiction. (Def.'s Mot. to Dismiss 1.) Following oral argument, this Court denied Plaintiffs' request for a temporary restraining order but reserved decision on Plaintiffs' request for a preliminary injunction as well as the Government's and NewPage's motions to dismiss. (Order Denying Pls.' Mot. for TRO, Jan. 11, 2007.)

PARTIES' CONTENTIONS

I. *Plaintiffs' Contentions*

A. Plaintiffs argue that this Court has jurisdiction to decide their claims.

Plaintiffs submit that this Court has jurisdiction pursuant to its residual jurisdiction provision, 28 U.S.C. § 1581(i),[4] to hear their allegation that Commerce's countervailing duty investigation is *ultra vires*. (Pls.' Prelim. Inj. Mem. 9–10.) Plaintiffs argue that section 1581(i) is available to them because the other potential vehicle for judicial review of their claims–filing suit under 28 U.S.C. § 1581(c)[5] after Commerce completes the investigation–is manifestly inadequate.[6] Plaintiffs insist that review under section 1581(c) cannot provide Plaintiffs with the remedy they seek, which is to be freed

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[4] The relevant subsections of 28 U.S.C. § 1581(i) (2000) provide that

> the Court of International Trade shall have jurisdiction of any civil action commenced against the United States providing for–
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> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; [and]
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> * * *
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> (4) administration and enforcement with respect to [such matters]. This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . under Section 516A(a) of the Tariff Act of 1930. . . .

[5] 28 U.S.C. § 1581(c) (2000) provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930."

[6] Jurisdiction is not available under section 1581(i) when "jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

from the obligation of participating in the underlying trade remedy proceeding. Plaintiffs explain that by the time they may bring a case under section 1581(c), the countervailing duty investigation they " 'seek to prevent will have already occurred.' " (*Id.* at 11 (*quoting Dofasco Inc. v. United States*, 28 CIT ___ , 326 F. Supp. 2d 1340, 1346 (2004), *aff'd on other grounds*, 390 F.3d 1344 (Fed. Cir. 2005)).)

Plaintiffs also refute the Government's argument that the case should be dismissed for lack of jurisdiction on ripeness grounds. Plaintiffs argue that the "final agency action" doctrine that the Government claims precludes this litigation is "not an absolute bar to challenging agency actions at an earlier point in time. Rather, the Court simply must analyze whether . . . the challenged agency action is ripe for review." (Pls.' Reply Br. 18.) Plaintiffs assert that the case is ripe for review because (a) additional agency fact-finding will not be helpful, as the case centers around the purely legal question whether Commerce had the authority to initiate the countervailing duty investigation (*id.* at 19), and (b) Plaintiffs will suffer irreparable harm "if Plaintiffs are unduly forced to wait until the Commerce Department issues its final determination before seeking review." (*Id.* at 20.)

Plaintiffs complain that withholding judicial review on the matter would result in serious hardship to Plaintiffs, particularly "the incredible burden imposed by having to respond to the Commerce Department's countervailing duty questionnaire and supplemental questionnaires and having to handle the Commerce Department verification." (*Id.*) Plaintiffs point to *Tokyo Kikai Seisakusho, Ltd. v. United States*, 29 CIT ___ , 403 F. Supp. 2d 1287 (2005), in which, Plaintiffs allege, the court "explicitly acknowledged that the burdens imposed on respondents in administrative reviews may very well render a challenge to the Commerce Department's initiation . . . ripe." (Pls.' Reply Br. 20.) Plaintiffs add that their claim that Commerce's initiation is *ultra vires* is exempted from the requirement of finality because it is a claim that the agency acted in excess of its statutory authority. (*Id.* at 21.)

B. Plaintiffs argue that Commerce was prohibited from initiating the countervailing duty investigation by both statute and Commerce's own binding rule.

On the merits, Plaintiffs claim that Commerce's initiation of the countervailing duty investigation of coated free sheet paper from the PRC was *ultra vires*.[7] Plaintiffs argue that Commerce does not have the discretion to apply countervailing duty law to NMEs because the CAFC "definitively ruled" that the countervailing duty statute "may

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[7] An *ultra vires* action is one that is "beyond the scope or in excess of legal power or authority." *Webster's Third New Int'l Dictionary* 2480 (Philip Babcock Gove ed.-in-chief, Merriam-Webster 1981).

not be applied to imports from NME countries." (Pls.' Prelim. Inj. Mem. 14.) Plaintiffs maintain that the CAFC's holding in *Georgetown Steel*

> did not reflect any deference to the expertise of the administering agency in interpreting the statute . . . but rather the court of appeal's own careful examination of: (i) the statutory language; (ii) Congressional action (and inaction); (iii) the presence of other provisions to address imports from NMEs; and (iv) the impracticability of investigating subsidies in NME countries.

(*Id.*)

Plaintiffs also argue that the legislative history of amendments to the countervailing duty statute subsequent to *Georgetown Steel* further supports their position that Congress did not intend the countervailing duty law to be applied to NMEs. (*See id.* at 21 (alleging that the Statement of Administrative Action accompanying the Uruguay Round Agreements Act explicitly affirmed that the countervailing duty law does not apply to NMEs).) Plaintiffs insist that because Congress "has spoken on the matter" Commerce's proposal to "appl[y] the CVD law to an NME country is completely inconsistent with settled law . . . [and] is invalid on its face." (*Id.* at 23.)

Plaintiffs alternatively argue that "[e]ven if the statute permits the Commerce Department to apply CVD law to NME's, Commerce has promulgated a binding rule" excluding NMEs from the reach of the countervailing duty legislation and this binding rule "may not be amended without first complying with [Administrative Procedure Act ("APA")] rulemaking requirements." (*Id.*) Plaintiffs assert that Commerce created this binding rule by (a) adopting the position that countervailing duty law does not apply to NMEs "after a specific notice and comment period" in 1984 (*id.* at 25), (b) consistently dismissing countervailing duty petitions involving NMEs over the two decades following *Georgetown Steel* (*id.* at 25), and (c) codifying its intent not to apply countervailing duty law to NMEs in the preamble to its regulations (*id.* at 27). Plaintiffs argue that Commerce is now "prohibited from changing its approach [i.e., applying countervailing duty law to NMEs] without first complying with the rulemaking requirements of the APA," (*id.* at 23), which require an agency to "engage in a notice and comment period if it wishes to change [a] rule" (*id.* at 24). Whether precluded by statute or by Commerce's own binding rule, Plaintiffs argue that Commerce exceeded its authority when it initiated a countervailing duty investigation of coated free sheet paper from the PRC and request that this Court enjoin Commerce from continuing the investigation.

II. *Defendant's Contentions*

A. The Government argues that this Court lacks jurisdiction to hear Plaintiffs' claims.

The Government argues that Plaintiffs may not bring their challenge under section 1581(i) because they may seek judicial review pursuant to another jurisdictional provision, specifically, 28 U.S.C. § 1581(c), after Commerce issues its final determination in the countervailing duty investigation. (Def.'s Mem. in Supp. of Its Mot. to Dismiss & Opp'n to Pls.' Mot. for a Prelim. Inj. ("Def.'s Mem.") 6.) The Government insists that the remedy provided by section 1581(c) is "entirely adequate" because section 1581(c) "will give Plaintiffs a full opportunity to contest both the statutory basis of the investigation and the methodological choices made in any final determination. . . ." (*Id.* at 12.)

The Government also argues that this Court does not have jurisdiction because "review pursuant to [section] 1581(i) is inappropriate when 'the jurisdictional issue and the merits are inextricably intertwined, and the former cannot be resolved without considering and deciding (at least in part) the latter.' " (Def.'s Reply in Supp. of Its Mot. to Dismiss ("Def.'s Reply") 6 (*quoting Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000)).) The Government explains that "it is not possible to separate the merits of the decision from those relating to jurisdiction . . . because in order for this Court to determine whether this investigation is *ultra vires*, it would have to determine whether CVD law *could* be applied to an NME. . . ." (*Id.* at 8 (emphasis added).)

Moreover, the Government adds, this Court lacks jurisdiction on ripeness grounds because Commerce has not yet taken "final agency action." (Def.'s Mem. 8.) The Government argues that the decision to initiate a countervailing duty investigation "is not a final decision as to whether Commerce will change its practice." (*Id.* at 9.) The Government alleges that the decision to initiate is a "threshold determination" rather than "final agency action" and, thus, is not ripe for review. (*Id.* (*quoting U.S. Ass'n of Imps. of Textiles & Apparel v. United States Dep't of Commerce*, 413 F.3d 1344, 1349 (Fed. Cir. 2005)).)

B. The Government argues that Commerce is not prohibited by statute or rule from initiating a countervailing duty investigation of the PRC.

Substantively, the Government urges this Court to deny Plaintiffs' motion for a preliminary injunction because–among other reasons–Plaintiffs are not likely to succeed on the merits of their case. The Government maintains that Commerce has the authority to initiate a countervailing duty investigation of coated free sheet paper from the PRC. (*Id.* at 15.) The Government asserts that neither the countervailing duty statute nor Commerce's rules limit the agency's

power to initiate countervailing duty investigations of NMEs. (*Id.*) The Government disagrees with Plaintiffs' allegation that the CAFC in *Georgetown Steel* held that Commerce is prohibited from applying countervailing duty law to NMEs. "*Georgetown Steel* did not hold that the CVD law could never apply to NMEs under any circumstances, but only that Commerce's decision not to apply it in that case was reasonable."[8] (*Id.* at 23.)

In addition, the Government argues that Commerce did not violate a binding rule by initiating a countervailing duty investigation of coated free sheet paper from the PRC. The Government acknowledges that Commerce has had a *policy* of not applying countervailing duty law to NMEs but argues that policies are not subject to the notice and comment procedures of the APA. (*Id.* at 27 (*quoting* 5 U.S.C. § 553(b)(3)(A) (2000) (excluding "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from the notice and comment requirements of the APA)).) The Government alleges that "[a]n agency has broad discretion to determine whether notice-and-comment rulemaking or case-by-case adjudication is the more appropriate procedure for changing a policy or practice." (*Id.* (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947)).) Therefore, the Government argues that Commerce did not violate the APA by initiating an investigation of the PRC as the mechanism by which to determine whether to change its policy regarding the non-application of countervailing duty law to NMEs. (*Id.*)

DISCUSSION

Plaintiffs urge this Court to enjoin Commerce from continuing the countervailing duty investigation of coated free sheet paper from the PRC on the ground that Commerce lacked the authority to initiate the investigation. However, the threshold issue before this Court is whether–*prior to the conclusion of the administrative proceeding*–this Court has jurisdiction pursuant to 28 U.S.C. § 1581(i) to review Commerce's initiation of a countervailing duty investigation. This Court holds that because Plaintiffs may seek judicial review under section 1581(c) once Commerce issues the final determination in the countervailing duty investigation and review in accordance with section 1581(c) is not manifestly inadequate, this Court does not have

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[8] NewPage argues that legislative history indicates that Commerce is authorized to apply countervailing duty law to NMEs. (NewPage Corp.'s Mem. in Supp. of Its Mot. to Dismiss Pls.' Compl. and in Opp'n to Pls.' Mot. for Prelim. Inj. 25 ("the [Permanent Normal Trade Relations] legislation specifically authorized appropriations to Commerce for the purpose of defending U.S. CVD measures with respect to China. 22 U.S.C. § 6943. This evidences Congress' view that Commerce had the legal authority to conduct CVD proceedings on imports from China.").)

jurisdiction under section 1581(i) to review Commerce's decision to initiate.

I. *Jurisdiction is Available Under 28 U.S.C. § 1581(c).*

Plaintiffs claim that 28 U.S.C. §§ 1581(i)(2) and (i)(4) provide the basis for this Court's jurisdiction over this matter. The statute grants this Court exclusive jurisdiction over "any civil action . . . that arises out of any law of the United States providing for– . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; [or] . . . (4) administration and enforcement with respect to" such matters. 28 U.S.C. § 1581(i) (2000). While section 1581(i) is "a broad residual jurisdictional provision," *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), it contains the limitation that "[t]his subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 [19 U.S.C. § 1516a]. . . ." 28 U.S.C. § 1581(i). The CAFC interprets this limitation to mean that the Court of International Trade does not have jurisdiction over a matter under section 1581(i) when "jurisdiction under another subsection of section 1581 *is or could have been available*, unless the remedy under that other subsection would be manifestly inadequate." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (*quoting Miller*, 824 F.2d at 963).

This Court agrees with the Government that, at the conclusion of Commerce's investigation, Plaintiffs may file suit under section 1581(c) challenging Commerce's authority to initiate the countervailing duty investigation. Section 1581(c) grants the Court jurisdiction "of any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c) (2000). Section 516A of the Tariff Act of 1930 authorizes interested parties to file suit within thirty days after Commerce publishes a final countervailing duty determination in the Federal Register "contesting any factual findings or legal conclusions upon which the determination is based." 19 U.S.C. § 1516a(a)(2). As the court explained in *Tokyo Kikai Seisakusho*,

> [i]f plaintiffs are dissatisfied with the outcome of the [underlying trade remedy proceeding] they will have the opportunity to challenge, in an action brought under 19 U.S.C. § 1516a, the authority of Commerce to initiate the review as well as other aspects of a final decision. Dismissing plaintiffs' complaint, therefore, will not deprive plaintiffs of their opportunity to be heard on the merits of their complaint.

Tokyo Kikai Seisakusho, 403 F. Supp. 2d at 1293. Thus, Plaintiffs have a clear right of review under section 1581(c) of Commerce's final determination *after* Commerce concludes the countervailing duty investigation.

II. *The Remedy Available Under 28 U.S.C. § 1581(c) is Not "Manifestly Inadequate."*

Because Plaintiffs may bring their challenge under section 1581(c) at the conclusion of Commerce's investigation, the question becomes whether the judicial review provided by section 1581(c) is "manifestly inadequate" for Plaintiffs. *See Miller*, 824 F.2d at 963. Although "neither Congress nor the courts have attempted to precisely define" the "manifestly inadequate" standard, *Hylsa, S.A. de. C.V. v. United States*, 21 CIT 222, 228 (1997) ("*Hylsa I*"), it is clear that " 'mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate.' " *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (*quoting Miller*, 824 F.2d at 964). Further, "[g]iven the clear Congressional preference expressed in 28 U.S.C. § 1581(i) for review in accordance with 19 U.S.C. § 1516a, the court is reluctant to interfere in ongoing proceedings absent clear indication of the lack of adequacy of a § 1581(c) review." *Hylsa I*, 21 CIT at 228. If Plaintiffs "will have a meaningful opportunity after the final determination to challenge Commerce's decision . . . , then the court must stay its hand at this stage of the proceedings." *Macmillan Bloedel Ltd. v. United States*, 16 CIT 331, 332 (1992). This Court holds that section 1581(c) provides a sufficient opportunity for Plaintiffs to seek judicial review of their issues. *See Hylsa I*, 21 CIT at 227.[9]

One factor for the court to consider in determining whether section 1581(c) review is manifestly inadequate "is whether the agency has acted *ultra vires*." *Id*. Plaintiffs acknowledge that they could not seek interlocutory review of Commerce's decision to initiate if Commerce has the authority to apply countervailing duty law to NMEs. (*Id*. ("We emphasize that this is *not* a case involving mere participation

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[9] This Court acknowledges the *Asocoflores* line of cases, which hold that section 1581(c) is manifestly inadequate to address an allegation that an agency initiated an unlawful trade remedy proceeding. *See Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 13 CIT 584, 588, 717 F. Supp. 847 (1989) ("*Asocoflores*"). However, this Court notes that it is not bound by these prior decisions and that the CAFC explicitly declined to resolve the issue of whether section 1581(i) is available to plaintiffs who allege that Commerce's initiation of a trade remedy proceeding is *ultra vires*, *Asociacion Colombiana de Exportadores de Flores v. United States*, 903 F.2d 1555, 1558 (Fed. Cir. 1990). This Court interprets prevailing case law to direct this Court to find that section 1581(c) is not manifestly inadequate in this case.

in a *lawful* Commerce Department proceeding, which we recognize would not be sufficient to trigger jurisdiction under section 1581(i).").) Yet, it is not clear that Commerce is prohibited from applying countervailing duty law to NMEs. Nothing in the language of the countervailing duty statute excludes NMEs. In fact,"[a]t the time of the original enactment [of the countervailing duty statute] there were no nonmarket economies; Congress therefore had no occasion to address" whether countervailing duty law would apply to NMEs. *Georgetown Steel*, 801 F.2d at 1314. Although Plaintiffs allege that "[t]he CAFC has definitively ruled that the CVD law was not intended to be applied against NMEs" (Pls.' Prelim. Inj. Mem. 14), the *Georgetown Steel* court did not go as far as Plaintiffs claim and find that the countervailing duty law is not applicable to NMEs, *Georgetown Steel*, 801 F.2d at 1318. Rather, the *Georgetown Steel* court only affirmed Commerce's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing "broad discretion" of the agency to determine whether to apply countervailing duty law to NMEs. *Id.* While a later court may determine that the statute favors Plaintiffs' interpretation that countervailing duty law does not apply to NMEs, it is not clear at this point that Commerce's initiation of the countervailing duty investigation was "patently *ultra vires*."[10] *See Hylsa I*, 21 CIT at 229. In these circumstances "it is not a futile exercise to provide the government with an opportunity to grapple with [the substance of] this issue in the first instance." *Id.* at 228–29.

Additionally, this Court finds that the delay of judicial review occasioned by awaiting the conclusion of Commerce's countervailing duty investigation is not significant enough to make jurisdiction under section 1581(i) manifestly inadequate. Commerce has not yet decided whether to apply countervailing duty law to NMEs; Plaintiffs' only obligation at this point is to participate in the countervailing duty investigation.[11] This obligation is similar to that of the plaintiff

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[10] Plaintiffs face a similar obstacle with their "binding rule" claim. Plaintiffs argue that Commerce was not allowed to initiate the countervailing duty investigation of coated free sheet paper from the PRC due to a "binding rule" Commerce adopted exempting NMEs from application of the countervailing duty law. (Pls.' Prelim. Inj. Mem. 23.) However, this Court is not convinced that Commerce adopted such a "binding rule." While Commerce acknowledges that it has a policy or practice of not applying countervailing duty law to NMEs, *see, e.g., Request for Comment*, Commerce has not promulgated a regulation confirming that it will not apply countervailing duty law to NMEs. In the absence of a rule, Commerce need not follow the notice-and-comment obligations found in the APA, 5 U.S.C. § 553, and instead may change its policy by "ad hoc litigation." *Chenery Corp.*, 332 U.S. at 203.

[11] This Court agrees with the *Asocoflores* court that not participating in the countervailing duty investigation is not a viable option for Plaintiffs. *Asocoflores*, 13 CIT at 587 ("[P]laintiffs cannot simply choose not to participate at this time because as a practical matter the risk of non-participation is simply too great.").

in *FTC v. Standard Oil*, 449 U.S. 229, 233 (1980). The *Standard Oil* court concluded that because the plaintiff "d[id] not contend that the issuance of the complaint had any . . . legal or practical effect, except to impose upon [the plaintiff] the burden of responding to the charges made against it," *id*. at 242, judicial review would have to wait until the investigation concluded, *id*. at 247.[12]

Plaintiffs complain that the burden of participating in the countervailing duty investigation as well as the business risk of incurring unknown countervailing duty liability on future imports renders section 1581(c) manifestly inadequate. (Pls.' Prelim. Inj. Mem. 34–35.) However, the cost associated with defending oneself in a trade remedy proceeding is not the type of burden with which this Court concerns itself. Because the "inconvenience and expense" associated with a trade remedy proceeding "are inherent in the administrative and judicial review process [they] cannot therefore constitute manifest inadequacy for what is the normal jurisdictional scheme." *Abitibi-Consol. Inc. v. United States*, 30 CIT ___, 437 F. Supp. 2d 1352, 1362 (2006); *see also Standard Oil*, 449 U.S. at 244 ("we do not doubt that the burden of defending this proceeding will be substantial. But the expense and annoyance of litigation is part of the social burden of living under government") (internal quotation omitted). Furthermore, the business uncertainty claimed by Plaintiffs is "an ordinary effect of the [trade remedy] regime, and therefore, the disruptions it entails cannot constitute a basis under which the court bypasses section 1581(c) jurisdiction in favor of section 1581(i)." *Abitibi-Consol.*, 437 F. Supp. 2d at 1361.

Moreover, this Court notes that the delay before section 1581(c) review is available is not lengthy. Ordinarily, Commerce must issue a preliminary determination in a countervailing duty investigation within sixty-five days of the initiation of the investigation. 19 U.S.C. § 1671b(b) (2000).[13] If Commerce makes an affirmative preliminary determination, the agency must then make its final determination within seventy-five days after the date of the preliminary determination. 19 U.S.C. § 1671(d) (2000). Plaintiffs will likely have to wait less than six months from the petition filing date for the availability of judicial review under section 1581(c).

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[12] While the question before the *Standard Oil* court was whether initiation of an investigation constituted "final agency action," this Court finds the *Standard Oil* court's analysis instructive on whether it is "manifestly inadequate" to require Plaintiffs to seek judicial review of Commerce's decision to initiate only *after* participating in the countervailing duty investigation. This Court finds that lack of "legal or practical effect" of the investigation is relevant in evaluating the hardship to Plaintiffs of participating in the investigation. *See Standard Oil*, 449 U.S. at 247.

[13] The deadline for the preliminary determination can be extended to 130 days in certain circumstances. 19 U.S.C. § 1671b(c)(1) (2000).

Plaintiffs have failed to convince this Court that waiting until judicial review under section 1581(c) is available is manifestly inadequate. Because Plaintiffs have not demonstrated that the remedy afforded by section 1581(c) is manifestly inadequate, this Court concludes that it lacks jurisdiction under section 1581(i) to hear Plaintiffs' case. The proper time for Plaintiffs to bring suit challenging Commerce's initiation is *after* Commerce publishes the final determination in the countervailing duty investigation.[14]

CONCLUSION

Because the initiation by Commerce of a countervailing duty investigation is reviewable under 28 U.S.C. § 1581(c) and the remedy available under that provision is not manifestly inadequate, this Court cannot exercise jurisdiction over this case under section 1581(i). Therefore, this Court grants Defendant's motion to dismiss the action for lack of jurisdiction. Judgment will enter accordingly.

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[14] As this Court dismisses Plaintiffs' action on the ground that section 1581(c) is available and adequate to review Plaintiffs' claims, this Court finds it unnecessary to address an additional ground the Government raises, which is to dismiss the case for lack of jurisdiction because Plaintiffs' claims are not yet ripe. However, the *Standard Oil* and *U.S. Association of Importers of Textiles and Apparel* precedents suggest that this Court could also dismiss Plaintiffs' case on ripeness grounds. The *Standard Oil* court held that initiation of an investigation was a "threshold determination," *Standard Oil*, 449 U.S. at 493, and dismissed the plaintiff's suit for lack of jurisdiction on the ground that judicial review was not available until the agency took "final agency action." *Id.* at 496. Similarly, the court in *U.S. Association of Importers of Textiles and Apparel* held that the trial court lacked jurisdiction to enjoin an agency from considering a request to apply economic safeguards on imports from the PRC until the agency took "final agency action." *U.S. Ass'n of Imps. of Textiles & Apparel*, 413 F.3d at 1353.

This Court would further like to note that the Government's argument that *Nippon Steel* precludes jurisdiction here is without merit. (*See* Def.'s Reply Br. 6.) *Nippon Steel* did *not* hold, as the Government claims, that "review pursuant to 1581(i) is inappropriate when 'the jurisdictional issue and the merits are inextricably intertwined. . . .' " (Def.'s Reply Br. 6 (*quoting Nippon Steel*, 219 F.3d 1348, 1353 (Fed. Cir. 2000)).) Rather, the *Nippon Steel* court held that where "the jurisdictional issue and the merits are inextricably intertwined, and the former cannot be resolved without considering and deciding (at least in part) the latter," the CAFC is sometimes able to "bypass[ ] the jurisdictional question and decid[e] the merits" of the case. *Nippon Steel*, 219 F.3d at 1353.

Slip Op. 07–50

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, GOLD EAST PAPER (JIANGSU) COMPANY, LIMITED, and GLOBAL PAPER SOLUTIONS, INCORPORATED, Plaintiffs, v. UNITED STATES, Defendant, and NEWPAGE CORPORATION, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL–CIO–CLC Defendants-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 07–00010

JUDGEMENT

Upon consideration of the papers submitted by the parties and the arguments presented at oral argument, and upon due deliberation, it is hereby

ORDERED that Defendant's motion to dismiss for lack of jurisdiction is granted.

Slip Op. 07–51

FORMER EMPLOYEES OF INTERNATIONAL BUSINESS MACHINES CORPORATION, *Plaintiffs*, v. U.S. SECRETARY OF LABOR, *Defendant*.

Court No. 04–00079

[Action remanded to Defendant for further proceedings not inconsistent with opinion. Judgement reserved as to consequences of Defendant's failure to comply with court's prior instructions.]

Dated: March 30, 2007

King & Spalding LLP (*J. Michael Taylor*, *Christine E. Savage*, *Tina M. Shaughnessy*, and *Stephen A. Jones*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); *Stephen R. Jones*, Office of the Solicitor, U.S. Department of Labor, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

This action challenges the determinations of the U.S. Department of Labor denying the petition for trade adjustment assistance

("TAA") filed by the plaintiff Former Employees,[1] who claim TAA benefits as "leased service workers," and who were employed for years by BP/Amoco, before being "outsourced" to the consulting services group of Pricewaterhouse Coopers ("PwC"), which was – in turn – acquired by IBM, before the Former Employees' termination.

Pending before the Court is the Labor Department's [Third] Notice of Negative Determination on Remand, 41 Fed. Reg. 10,709 (March 2, 2006) (CSAR 1019–50; SAR 1019–50) ("Third Negative Redetermination on Remand"), which was filed pursuant to *Former Employees of Int'l Bus. Mach. Corp.*, 29 CIT ___ , 403 F. Supp. 2d 1311 (2005) ("*IBM I*").[2] In its Third Negative Redetermination on Remand, the Labor Department announced a new Leased Worker Policy, establishing seven criteria to be applied in cases – like this one – involving leased workers, "to determine the extent to which a worker group engaged in activities related to the production of an article by a producing firm is under the operational control of the producing firm." *See* Third Negative Determination on Remand, 41 Fed. Reg. at 10,712. Concluding that all seven criteria weighed against the Former Employees here, the Labor Department reaffirmed its denial of TAA certification. *Id.* at 10,712–14; CSAR 1035–50.

The Former Employees challenge the Third Negative Redetermination on Remand, characterizing the Labor Department's remand investigation as "a sham, which lacked transparency and was conducted to reach a predetermined negative result." *See* Plaintiffs' Comments Concerning the Department of Labor's Negative Determination on Remand ("Pls.' Brief") at 1; *see also* Plaintiffs' Reply to Defendant's April 28, 2006 Response ("Pls.' Reply Brief") at 1–5. The

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[1] *See* Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance, 69 Fed. Reg. 2,621, 2,622 (Jan. 16, 2004) ("Notice of Initial Denial"); Notice of Negative Determination Regarding Application for Reconsideration, 69 Fed. Reg. 20,644 (April 16, 2004) ("Notice of Denial of Reconsideration"); Notice of Negative Determination on Reconsideration on Remand, 69 Fed. Reg. 48,527 (Aug. 10, 2004) ("Notice of Second Negative Redetermination on Remand"); Notice of Negative Determination on Remand, 71 Fed. Reg. 10,709 (March 2, 2006) ("Third Negative Redetermination on Remand").

[2] As outlined in greater detail below, this action has been remanded to the Labor Department three times to date. There are two separately-paginated administrative records – the initial Administrative Record (which includes the records of both the agency's initial investigation and its first voluntary remand investigation), and the Supplemental Administrative Record (which consists of the record of the second voluntary remand investigation, as well as that of the third remand investigation, which was ordered by *IBM I*). Moreover, because confidential information is included in the file, there are two versions of each of the records – public and confidential.

Citations to the public versions of the Administrative Record and the Supplemental Administrative Record are noted as "AR ____ " and "SAR ____ ," respectively. Citations to the confidential versions are, in turn, noted as "CAR ____ " and "CSAR ____ ."

The administrative record of the most recent remand proceeding – the third remand – begins at CSAR/SAR 270. A redacted, public version of the Labor Department's most recent remand determination is published in the Federal Register, and is included in the record at SAR 1019–50. The complete, confidential version of that same determination appears in the record at CSAR 1019– 50.

Former Employees further contend that, contrary to the agency's determination, "substantial record evidence demonstrates that the Former Employees were under the operational control of BP," and that the Labor Department "has failed to identify any other certification requirements not supported by substantial evidence on the record." Pls.' Brief at 3; *see also* Pls.' Reply Brief at 8–9.

Accordingly, the Former Employees urge the Court to reverse the Third Negative Redetermination on Remand, and to order the Labor Department to certify the Former Employees as eligible to receive TAA benefits. In the alternative, the Former Employees ask that the Court remand this matter to the Labor Department after explicitly finding that the agency's determination as to operational control is not supported by substantial evidence and that the Former Employees' satisfaction of all other requirements for certification has been conceded. Pls.' Brief at 36; Pls.' Reply Brief at 1, 11.

For its part, the Government maintains that the Labor Department's Third Negative Redetermination on Remand is supported by substantial evidence in the administrative record and is otherwise in accordance with law. The Government therefore contends that the agency's negative determination should be sustained in all respects. *See generally* Defendant's Response to Plaintiffs' Comments Upon Labor's Remand Determination ("Def.'s Brief").

Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (2000).[3] For the reasons set forth below, this action is remanded to Defendant yet again, for further proceedings not inconsistent with this opinion, and judgement is reserved as to the consequences of Defendant's failure to comply with the Court's instructions in *IBM I*. *See, e.g.*, section IV.E, *infra*.

I. *The Relevant Legal Framework*

Trade adjustment assistance has long served as the *quid pro quo* for U.S. national policies of free trade. *See generally Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT ___ , ___ , 454 F. Supp. 2d 1306, 1307–08 (2006) (*citing Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT 1930, 1943–44, 298 F. Supp. 2d 1338, 1349–50 (2003) ("*Chevron III*")) (summarizing policy underpinnings of TAA laws). As *UAW v. Marshall* explains, "much as the doctrine of eminent domain requires compensation when private property is taken for public use," the TAA laws similarly reflect the country's recognition that "fairness demand[s] some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the

[3] Except as otherwise noted, all statutory citations are to the 2000 edition of the United States Code.

particular . . . workers who suffer a [job] loss. *UAW v. Marshall*, 584 F.2d 390, 395 (D.C. Cir. 1978).

Trade adjustment assistance is generally designed to assist workers who have lost their jobs as a result of increased import competition from – or shifts in production to – other countries,[4] by helping those workers "learn the new skills necessary to find productive employment in a changing American economy." *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 26 CIT 1272, 1273, 245 F. Supp. 2d 1312, 1317 (2002) ("*Chevron I*") (*quoting* S. Rep. No. 100–71, at 11 (1987)).[5]

As remedial legislation, the TAA laws are to be construed broadly to effectuate their intended purpose. *UAW v. Marshall*, 584 F.2d at 396 (recognizing the "general remedial purpose" of TAA statutes, and noting that "remedial statutes are to be liberally construed").[6] More-

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[4] Specifically, the TAA statute provides for the certification of workers where:

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

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

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

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

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

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

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

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

19 U.S.C. § 2272(a) (Supp. II 2002).

[5] As expanded in 2002, the TAA program entitles eligible workers to receive benefits which may include employment services (such as career counseling, resume-writing and interview skills workshops, and job referral programs), vocational training, job search and relocation allowances, income support payments, and a Health Insurance Coverage Tax Credit. *See* generally 19 U.S.C. § 2272 *et seq.* (2000 & Supp. II 2002); *BMC*, 30 CIT at ____ , 454 F. Supp. 2d at 1309–10.

[6] *See also BMC*, 30 CIT at ____ , 454 F. Supp. 2d at 1311 (and cases cited there); *Former Employees of Ameriphone, Inc. v. United States*, 27 CIT ____ , ____ , 288 F. Supp. 2d 1353, 1355 (2003) (citations omitted); *Former Employees of Electronic Data Sys. Corp. v. U.S. Sec'y of Labor*, 28 CIT ____ , ____ , 350 F. Supp. 2d 1282, 1290 (2004) ("*EDS I*"); *Former Employees of Champion Aviation Prods. v. Herman*, 23 CIT 349, 352 (1999) (citations omitted) (NAFTA–TAA statute is remedial legislation, to be construed broadly); *Chevron I*, 26

over, both "because of the *ex parte* nature of the certification process, and the remedial purpose of [the TAA statutes], the [Labor Department] is obliged to conduct [its] investigation with the utmost regard for the interests of the petitioning workers." *Stidham v. U.S. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (*citing Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (quotation marks omitted)); *see also BMC*, 30 CIT at ___ , 454 F. Supp. 2d at 1312 (and cases cited there).

Thus, although the Labor Department is vested with considerable discretion in the conduct of its investigations of TAA claims, "there exists a threshold requirement of reasonable inquiry." *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993). Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations.[7]

II. *Background*

As detailed in *IBM I*, the events leading to this action stretch back more than a decade, and include a corporate merger, the workforce reduction that followed that merger, the "outsourcing" of the Former Employees, the acquisition of their new employer by another firm, and, ultimately, their termination, followed by a growing line of determinations by the Labor Department denying their petition for TAA certification. *See generally IBM I*, 29 CIT at ___ , ___ , 403 F. Supp. 2d at 1313, 1319–23.

A. *The Facts of the Case*

In some cases for up to 30 or 40 years prior to their termination, the Former Employees worked in the oil and gas industry – supporting exploration, drilling, and production from the same wells owned by the same oil company, doing the same tasks, day in and day out, seated at the same desks, inside the same facility in Tulsa, Oklahoma (the "Accounting Center"). *See generally IBM I*, 29 CIT at ___ , ___ , 403 F. Supp. 2d at 1313, 1319.

The Former Employees' initial employer, Amoco Corporation, merged with The British Petroleum Company p.l.c. in December 1998, and – as a result – the Former Employees became employees of BP Amoco Group (now known as BP p.l.c., or simply "BP"). The Former Employees survived the layoffs that followed the 1998 merger. Their colleagues who were less fortunate were later certified

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CIT at 1274, 245 F. Supp. 2d at 1318 (citations omitted) (same).

[7] *See, e.g., BMC*, 30 CIT at ____ n.10, 454 F. Supp. 2d at 1312 n.10 (cataloguing numerous opinions criticizing Labor Department's handling of TAA cases); *see also id.*, 30 CIT at ____ , 454 F. Supp. 2d at 1352–54 (analyzing agency's overall "track record" before the court).

as eligible to apply for TAA benefits, in 1999.[8] *See generally IBM I*, 29 CIT at ___ , ___ , 403 F. Supp. 2d at 1313, 1319.

In 2000, the Former Employees and others at the Accounting Center who had survived the post-merger reductions in force were struck by another wave of corporate restructuring, when BP "outsourced" their unit to Pricewaterhouse Coopers ("PwC"). Two years later, IBM acquired PwC's consulting services business, and the Former Employees became employees of IBM. *See generally IBM I*, 29 CIT at ___ , ___ , 403 F. Supp. 2d at 1313, 1319.

The Former Employees maintain that, although they were "outsourced" by BP, nothing ever really changed except the company signing their paychecks. The Former Employees attest that, even after their "outsourcing," the workers at the Accounting Center continued to work for BP – "managing oil and gas production and related leases, managing BP's production-related assets and equipment, accounting for various production plants, supporting division order operations, performing procurement functions, and submitting regulatory government reports on North American production." Indeed, according to the Former Employees, BP retained control over work done at the Accounting Center at all times, both as a matter of contract and as a matter of operational reality. *See generally IBM I*, 29 CIT at ___ , ___ , 403 F. Supp. 2d at 1313, 1319.

Although the Former Employees had successfully weathered repeated corporate shake-ups in the past, their luck ran out in 2003, when they were terminated – a development which they trace to surging imports of oil and natural gas, as well as BP's shift from domestic to foreign production. *See generally IBM I*, 29 CIT at ___ , ___ , 403 F. Supp. 2d at 1313, 1319.

According to the Former Employees, at the time of their termination, they were still sitting at the same desks in the same building doing the same work for the same company in support of the same production facilities as their former colleagues who were laid off in 1998. Just as their colleagues laid off in 1998 had done, the Former Employees here filed a TAA petition. But the Former Employees' petition met a very different fate. *See generally IBM I*, 29 CIT at ___ , ___ , 403 F. Supp. 2d at 1313, 1319–20.

B. *The Procedural History of the Case*

In mid-November 2003, the Former Employees filed a petition with the Labor Department, seeking TAA certification. Within a

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[8] The Labor Department later determined that the workers laid off from the Accounting Center in 1998 had been "engaged in activities related to exploration and production of crude oil and natural gas," and were therefore entitled to TAA certification. That certification, in turn, was amended to reflect new ownership and another name change to BP/AMOCO Production Company, Inc. *See generally IBM I*, 29 CIT at ____ , ____ , 403 F. Supp. 2d at 1313, 1319.

week of the initiation of the investigation, their petition had been denied.[9]

1. *The Initial Denial and The First Voluntary Remand Proceeding*

The Labor Department's first negative determination rested on the agency's conclusion that the Former Employees did not produce an "article" within the meaning of the TAA statute. Notice of Initial Denial, 69 Fed. Reg. 2,621.

As *IBM I* explained, it is difficult to understate the superficial nature of the Labor Department's initial investigation. Indeed, the entire "investigation" consisted of a single two-page questionnaire, sent to an IBM official. The agency posed two questions concerning whether IBM produced an article at the Accounting Center. Nowhere did the agency seek to elicit information concerning the Former Employees' potential eligibility for certification as service workers. And nowhere did the agency probe IBM's contractual relationship with any other company – even though, on their petition form, the Former Employees listed "IBM/BP Amoco" in the space provided for "Company Name," and explained elsewhere on the form that the "Accounting Center performs accounting services for BPAmerica/BP Amoco Oil." Based on the scant information before it, the Labor Department sent a letter to the Former Employees, informing them that their TAA petition had been denied. *See generally IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1321.

The Former Employees filed both a request for reconsideration with the Labor Department and a letter with this Court seeking judicial review (later deemed the Complaint). In light of the pendency of both a request for administrative reconsideration and a Summons and Complaint challenging the same TAA determination, the Government sought – and was granted – a voluntary remand. *See generally IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1321.

2. *The First Negative Redetermination on Remand*

One day after the case was remanded to the agency, the Labor Department issued the results of its investigation on remand – reaffirming its denial of the Former Employees' TAA petition, but on different grounds. This time, the negative determination was based primarily on the Labor Department's finding that the Former Employees were "service workers." According to the agency's criteria then in place, service workers were eligible for TAA certification only

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[9] The Labor Department initiated its investigation on November 26, 2003. By December 2, 2003, it had already made a negative determination. *See* Notice of Investigations Regarding Certifications of Eligibility to Apply for Worker Adjustment Assistance, 68 Fed. Reg. 74,973, 74,975 (Dec. 29, 2003); Notice of Initial Denial, 69 Fed. Reg. 2,621 (Jan. 16, 2004); *IBM I*, 29 CIT at ____ n.14, 403 F. Supp. 2d at 1320 n.14.

if they were either "in direct support of an affiliated facility currently certified for TAA or employed on a contractual basis at a location currently certified for TAA." Notice of Denial of Reconsideration, 69 Fed. Reg. at 20,644; *see generally IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1321.

The Labor Department concluded that the Former Employees did not meet the applicable criteria. But the agency failed to consider whether the 1999 certification of the Former Employees' colleagues at the Accounting Center constituted evidence that the Former Employees – as service workers – had provided "direct support" to BP. Moreover, the agency paid scant attention to the undisputed fact that the Former Employees were paid by BP prior to 1999, and that – notwithstanding their "outsourcing" – they had continued to perform the same work for BP up to the time of their discharge. Notice of Denial of Reconsideration, 69 Fed. Reg. at 20,644–45; *see generally IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1321.[10]

3. *The Second Voluntary Remand Proceeding*

Less than a month after the results of the initial remand were published, the Government sought a second, 60-day voluntary remand, prompted by a letter from the Court inquiring about inconsistencies in the Labor Department's articulation of the criteria for TAA certification of service workers. The Government explained that a second remand was necessary to permit the agency to apply a new interpretation of the service workers criteria, which clarified that service workers could be certified provided that the production workers that they supported were "certifiable" for TAA (*i.e.*, eligible for certification) – even if the production workers had not actually been certified. The Government further explained that, on remand, the Labor Department "intend[ed] to supplement the administrative record with additional evidence regarding the relationship" between the Accounting Center and BP. *See generally IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1322.

Over the course of the two months that followed, the Labor Department verified the existence of the Service Level Agreement ("SLA") between BP and PwC/IBM, under which employees at the Accounting Center continued to provide services to BP even after the outsourcing (although the agency failed to obtain a copy of the con-

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[10] The sole evidence cited to support the Labor Department's determination was a statement by an IBM official based in North Carolina, who reportedly told the agency that there was no affiliation between the Accounting Center and BP, and that IBM "provide[d] accounting services to [BP] at many locations in the United States and abroad out of [the Accounting Center]." Notice of Denial of Reconsideration, 69 Fed. Reg. at 20,644–45. Significantly, that same IBM official later disclaimed "any firsthand knowledge of daily work activities of the Former Employees," and recommended that "someone else at IBM should be contacted for additional information." *See generally IBM I*, 29 CIT at ____ , 403 F. Supp. 2d at 1321–22 (citation omitted).

tract itself). Among other things, the Labor Department also learned that, although some IBM employees at the Accounting Center served some other companies, most of the work done at that location was for BP. *See generally IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1322–23.

4. *The Second Negative Redetermination on Remand*

Ultimately, the Labor Department denied certification of the Former Employees yet again, citing three grounds for its determination. First, although the Former Employees had never even claimed to be production workers, the Labor Department concluded that they could not be so certified. In the course of explaining that determination, the agency dismissed as "immaterial" the 1999 certification of the Former Employees' former colleagues at the Accounting Center. Second, and most relevant here, the Labor Department concluded that the Former Employees could not be certified as service workers because they were not under the "control" of BP. And, third, the agency concluded that – even if the Former Employees had been under the control of BP – they still would not be eligible for TAA benefits because they were not working in a BP production facility or in an appropriate subdivision of such a facility. Notice of Second Negative Redetermination on Remand, 69 Fed. Reg. 48,527; *see generally IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1323. The Labor Department's Second Negative Redetermination on Remand was the subject of *IBM I*. *Id*.

5. *The Court's Decision in IBM I*

Much of *IBM I* was devoted to the issue of "control." As *IBM I* noted, the Labor Department's traditional test for TAA certification of service workers requires, in relevant part, that the petitioning workers' separation be "caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or *a firm related by control*." *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1315 (*citing Chevron I*, 26 CIT at 1285, 245 F. Supp. 2d at 1328) (emphasis added).

IBM I explained that the Labor Department historically had interpreted "control" as limited to "ownership and corporate voting control." *Id.*, 29 CIT at ___ , 403 F. Supp. 2d at 1315 (*citing Former Employees of Pittsburgh Logistics Systems, Inc. v. U.S. Sec'y of Labor*, 27 CIT 1301, 1312 (2003) ("*Pittsburgh Logistics II*")). But, as *IBM I* noted, *Pittsburgh Logistics* ruled that "control" must be interpreted more expansively, to include not only corporate/legal control, but operational control as well. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1315–16 (*citing Pittsburgh Logistics II*, 27 CIT at 1314–16,1318–20).

The workers in *Pittsburgh Logistics* had been terminated from their employment at an LTV Steel Company facility in Indepen-

dence, Ohio, after LTV ceased production. The *Pittsburgh Logistics* ("PLS") workers petitioned for TAA certification, asserting that they were a "PLS subdivision" of LTV consisting of former LTV workers who had been "outsourced" to PLS; "that they were under the *de facto* control of LTV"; and that their duties were essential to the production of steel at LTV facilities. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1316 (*quoting Former Employees of Pittsburgh Logistics Systems, Inc. v. U.S. Sec'y of Labor*, 27 CIT 339, 341 (2003) ("*Pittsburgh Logistics I*")).

Although the Labor Department had certified workers at LTV's Cleveland plant (as well as certain workers at LTV's Independence facility), the agency initially denied the petition of the PLS workers, based in part on its finding that they were service workers and that their employer – PLS – was not related to LTV by ownership or "control." *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1316 (*citing Pittsburgh Logistics I*, 27 CIT at 340). But, based on the *Pittsburgh Logistics* court's more expansive interpretation of the term "control," and its determination that the PLS workers were indeed under the operational control of LTV, the Labor Department was ordered to certify the PLS workers as eligible for TAA benefits. *Pittsburgh Logistics II*, 27 CIT at 1318–20.

Wackenhut raised basically the same issues presented in *Pittsburgh Logistics*. *See Former Employees of Wackenhut Corp. v. U.S. Sec'y of Labor*, Court No. 02–00758. As *IBM I* explained, the Wackenhut Corporation had supplied BHP Copper, Inc. with workers who had provided security services at a BHP production facility in Arizona. Following lay-offs due to increased imports of copper cathodes and closure of the facility, the Labor Department certified BHP workers at the facility as eligible for TAA. But the agency twice denied the petition filed by the Wackenhut workers. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1316.

As *IBM I* explained, applying the same narrow definition of "control" that it had applied in *Pittsburgh Logistics*, the Labor Department had concluded in *Wackenhut* that the workers could not be certified as service workers, because "Wackenhut and BHP are not controlled or substantially beneficially owned by the same persons." *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1316–17 (*citing* The Wackenhut Corporation, San Manuel, AZ: Notice of Negative Determination on Reconsideration on Remand, 68 Fed. Reg. 47,097, 47,098 (Aug. 7, 2003) ("Wackenhut Notice of Denial on Reconsideration"); Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, 67 Fed. Reg. 67,421 (Nov. 5, 2002)).

But – as *IBM I* noted – the issuance of *Pittsburgh Logistics II* turned the tide for the Wackenhut workers, resulting in their certification. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1317 (*citing* The Wackenhut Corp., San Manuel, AZ: Notice of Revised Determination,

69 Fed. Reg. 26,623 (May 13, 2004) ("Wackenhut Notice of Revised Determination")). In January 2004, in response to *Pittsburgh Logistics* and similar cases, the Labor Department revised its policy on certification of so-called "leased" workers. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1317 (*citing* Labor Department Internal Memo re: New Leased Workers Policy (Jan. 23, 2004) (CSAR 261–62)). It was that January 2004 policy which was at issue in *IBM I*.

According to the Labor Department's January 2004 memorandum, which specifically referenced *Wackenhut*, "the existence of a standard contract between the contractor firm [*i.e.*, the leased workers' employer] and the subject firm [*i.e.*, the company producing the trade-impacted article] . . . should be considered sufficient evidence to prove the existence of a joint employer relationship." *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1317 (*quoting* Labor Department Internal Memo re: New Leased Workers Policy (CSAR 261–62)).[11] Significantly, however, the January 2004 memorandum did not identify operational (or other) "control" as a requirement for certification of leased workers. Moreover, although the January 2004 memorandum specified that – to be eligible for certification – leased workers "must perform their duties onsite at the affected location," no rationale for that requirement was stated. *See IBM I*, 29 CIT at ___ & n.10, 403 F. Supp. 2d at 1317–18 & n.10 (*citing* Labor Department Internal Memo re: New Leased Workers Policy (CSAR 261–62)).

IBM I observed that the Labor Department's Second Negative Redetermination on Remand denied the Former Employees' claim in part because they were not under the control of BP. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1325–26 (*citing* Notice of Second Negative Remand Determination, 69 Fed. Reg. 48,527). Noting that the Labor Department had applied a restrictive definition of control, *IBM I* affirmed that – in light of *Pittsburgh Logistics* – the Labor Department was required to define control more broadly, to include operational control. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1325–28.[12]

Moreover, *IBM I* found that the then-existing record included "relatively ample evidence supporting the Former Employees' claims that – as a practical matter – BP continued to exercise management

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[11] As *IBM I* noted, the January 2004 memorandum said little about the concept of a "joint employer" relationship – other than the passing reference quoted above – except to incorporate by reference another memorandum (missing from the record of this case) which apparently discusses that concept at greater length. *See IBM I*, 29 CIT at ____ , 403 F. Supp. 2d at 1318 (citation omitted).

[12] As an aside, *IBM I* observed that, although both the Labor Department and the Former Employees apparently assumed that the Former Employees are eligible for certification only if they were under the control of BP, the January 2004 Leased Worker Policy did not identify "control" as a certification requirement. *IBM I* further noted that it is unclear whether, as a matter of practice, the agency consistently required evidence of control in cases in which the January 2004 policy was applied. *See IBM I*, 29 CIT at ____ n.18, 403 F. Supp. 2d at 1327 n.18.

and operational control over their work up to the time of their termination." *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1329; *see generally id.*, 29 CIT at ___ , 403 F. Supp. 2d at 1328–37. In contrast, *IBM I* noted, there was at best "only minimal evidence that, at the time of their determination, the Former Employees were under the operational control of IBM." *Id.*, 29 CIT at ___ , 403 F. Supp. 2d at 1329. *IBM I* further observed that "the relatively little evidence that support[ed] the agency's position [on control] consist[ed] of mere conclusory assertions (generally by IBM officials) and/or statements . . . contradicted by other record evidence that the Labor Department . . . failed to address." *Id.*

Accordingly, *IBM I* directed:

> On remand, the Labor Department shall reevaluate the existing record evidence on the issue of "control" . . . , and shall conduct such further investigation of the relevant facts as is necessary to fully develop the evidentiary record (including solicitation of additional information from the Former Employees, among others).

IBM I, 29 CIT at ___ , 403 F. Supp. 2d at 1335–36. *IBM I* further required the agency, on remand, to "clearly articulate and apply a standard for 'control' . . . consistent with [the] opinion (clarifying and updating that set forth in its [January 2004] Leased Workers Policy)," and to detail the rationale for its standard. *Id.*, 29 CIT at ___ , 403 F. Supp. 2d at 1336–37.

Finally, *IBM I* emphasized that the facts of the case at bar are "particularly compelling, because – much like *Pittsburgh Logistics*, and in contrast to the more typical 'leased workers' case like *Wackenhut* (where the workers had no pre-existing relationship with the company producing the trade-impacted article) – the Former Employees in this case were employed directly by BP until they (and their work) were 'outsourced.' " *IBM I*, 29 CIT at ___ n.20, 403 F. Supp. 2d at 1328 n.20. *IBM I* therefore mandated that, on remand:

> [I]n both its articulation and its application of its policy vis-a-vis TAA certification of leased workers, the Labor Department should recognize and reflect (for purposes of its analysis of "control") the difference between standard, run-of-the-mill leased workers cases (where there was no pre-existing relationship between the leased workers and the company producing the trade-impacted article) *versus* cases – like this one – where the petitioning workers were "outsourced" by their initial employer and then immediately leased directly back to that company, as part of an outsourcing strategy.

IBM I, 29 CIT at ___ n.38, 403 F. Supp. 2d at 1336 n.38.

As an alternative ground for denying certification, the Second Negative Redetermination on Remand concluded that – even if BP

exercised control over the Former Employees – they nevertheless could not be certified, because they were not "co-located with BP workers at a BP facility that produces an article." *IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1337 (*citing* Notice of Second Negative Redetermination on Remand, 69 Fed. Reg. at 48,528); *see generally id.*, 29 CIT at ___ , 403 F. Supp. 2d at 1337–42. Therefore, in addition to analyzing the issue of "control," *IBM I* also reviewed the Labor Department's treatment of the location of the Former Employees' workplace.

IBM I found that the Labor Department's "so-called 'location requirement' " defied "meaningful judicial review," both because the agency had "failed to articulate the legal and policy bases for its position (or, frankly, even to adequately explain exactly what that position [was])," and because the evidentiary record that the agency had compiled on the issue was "anemic." *IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1338.[13] *IBM I* therefore required that:

> [O]n remand, the Labor Department shall (1) clearly articulate and explain the significance of any "co-location" criterion for TAA certification (and its relationship to other elements of any "location requirement"), as well as the distinctions – if any – that the agency draws between different classes of workers . . .; (2) adequately justify its position as a matter of law and policy (bearing in mind, *inter alia*, the remedial purpose of the TAA statute); and (3) explain whether, and to what extent, the agency's actual practice in the application of the "co-location" criterion – in this and other cases – has been consistent with the position that it is espousing here.

IBM I, 29 CIT at ___ & n.39, 403 F. Supp. 2d at 1337–38 & n.39. *IBM I* further directed that, "to the extent that the Labor Department continues to adhere to the 'co-location' criterion, the agency shall – on remand – reconsider its [negative] finding on 'co-location' in this matter and ensure that its determination is supported by substantial evidence in the record." *Id.*

IBM I concluded by observing that, in its Second Negative Redetermination on Remand, the Labor Department had failed to reach determinations on all applicable criteria for certification. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1345. Noting the existence of "confusion as to precisely how the agency's classic test for certification as 'service workers' [was] to be interpreted and applied in light of the agency's [January 2004] Leased Worker Policy," *IBM I* directed that:

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[13] *IBM I* also expressed the view that – rather than constituting a distinct criterion, separate and apart from "control" – location might be more properly treated as an indicia of "control." *See IBM I*, 29 CIT at ___ n.44, 403 F. Supp. 2d at 1339 n.44.

> On remand, the Labor Department shall spell out with precision all criteria applicable to the Former Employees' potential certification as leased service workers . . . (including any revisions or clarifications of that policy in the course of the remand). In addition, the Labor Department shall explain the origins of and legal bases for all such criteria.

IBM I, 29 CIT at ___ , 403 F. Supp. 2d at 1345–47; *see also id.*, 29 CIT at ___ n.38, 403 F. Supp. 2d at 1336 n.38 (mandating that agency include in the record on remand "a complete, self-contained statement articulating all agency criteria for TAA certification of leased workers"). *IBM I* further instructed the Labor Department to "make determinations as to whether each of the criteria [for certification of leased workers] is satisfied in this case," and encouraged the agency "to engage in full and candid consultations with the Former Employees on all issues." *Id.*, 29 CIT at ___ , 403 F. Supp. 2d at 1347.

6. *The Third Remand Proceeding*

In the course of the third remand proceeding, the Labor Department began – incredibly, for the first time – to seriously probe the merits of the Former Employees' petition for TAA certification. As the Former Employees candidly acknowledge, "Labor dedicated much more time to contacting and questioning IBM and BP representatives during this remand investigation than it had in any of the prior investigations undertaken in this case." Pls.' Brief at 7.

The Labor Department obtained a copy of the contract between BP and PwC/IBM. *See* CSAR 396–719. The agency also sent a total of five sets of questions to IBM,[14] and three sets to BP.[15] The agency's questions focused primarily on the issue of control, though a few were addressed to the circumstances that led to the termination of the Former Employees. *See, e.g.*, CSAR 732, 809.[16] In addition, the

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[14] *See generally* CSAR 730–32 (first set of questions), 720–24, 753 (first set of responses), 750–52 (second set of questions), 733–37 (second set of responses), 767–68 (third set of questions), 754–57 (third set of responses), 758–60 (fourth set of questions), 972–76 (fourth set of responses), 781–83 (fifth set of questions), 788–92 (fifth set of responses). In addition, the Labor Department asked IBM several supplemental or follow-up questions. *See, e.g.*, CSAR 764 (not clear whether response is included in the record), 793.

[15] *See generally* CSAR 808–09 (first set of questions), 812–14 (first set of responses), 826–28 (second set of questions), 814–18 (second set of responses), 839–42 (third set of questions), 843–46, 848 (third set of responses). The Labor Department also posed supplemental or follow-up questions to BP. *See* CSAR 837–38.

[16] As discussed in greater detail below, the Former Employees expressed concern at the time about the form of the agency's questions, and the lack of context for questions seeking to probe the issue of control. *See, e.g.*, CSAR 859 (expressing concern that responses of IBM and BP may be affected "as a result of the way in which Labor framed the questions"), 946 (criticizing agency for failure to provide context/definition of "control" in questions), 995 ("As we have discussed by telephone, we believe that most of the inconsistencies are the result of

Labor Department provided IBM with "the statements of the workers and their responses," and requested IBM's comments concerning "the accuracy of the[ ] [Former Employees'] statements and whether there are actual facts supporting [the Former Employees'] allegations." CSAR 786.[17]

Further, the Labor Department held two conference calls with IBM officials to discuss issues raised in the investigation, and convened at least one such call with officials of BP. *See generally* CSAR 742, 761–62, 993–94; *see also* CSAR 852. Although counsel for the Former Employees asked to participate in the agency's teleconferences with BP and IBM, they were never included. *See* CSAR 997 at n.1. The teleconferences were memorialized for the administrative record by the agency investigator in summary memoranda; but the completeness of those memoranda is in doubt. *See generally* section IV.D.2.a(3), *infra*.

In the course of the remand investigation, the Labor Department sent questions to the Former Employees as well, and provided their counsel with a copy of the contract between BP and PwC/IBM.[18] In addition to responding to the agency's inquiries, the Former Employees took the initiative to provide the Labor Department with other information relevant to their claims. *See, e.g.*, CSAR 913–14, 942–51. The agency investigator also had several phone conversations with counsel for the Former Employees, discussing the substantive merits of the Former Employees' case. *See, e.g.*, SAR 904.

However, the record reveals that the Labor Department never truly embraced *IBM I*'s recommendation to "engage in full and candid consultations with the Former Employees on all issues." *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1347.[19] For example, although the Labor Department contacted IBM and BP as early as the week of December 7 and forwarded questions to the two companies as early

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the record not reflecting the definition of control that Labor provided to IBM and BP for purposes of answering Labor's questions."); *see generally* n.56, *infra* (discussing Former Employees' objections to agency's use of "leading" questions); section IV.D.2.b, *infra* (discussing lack of definition of "control" in agency questions).

There is thus no truth to the Government's assertion that "at no time during the administrative proceeding did plaintiffs contend that any of the questions Labor asked was irrelevant or misleading." *See* Def.'s Brief at 25.

[17] From the record, it is not clear precisely what the Labor Department transmitted to IBM. Nor is it clear from the record whether IBM ever responded.

[18] *See generally* CSAR 853–54 (first set of questions), 859–61 (first set of responses), 899J–903 (second set of questions), 913–21 (second set of responses), 995–1000 (third set of questions, with responses); *see also* CSAR 864 (transmitting BP-PwC/IBM contract), 922 (transmitting BP-PwC/IBM Service Level Agreement).

[19] Though the events largely speak for themselves, the Government and the Labor Department strive to cast a rather different light on the chronology of, and certain developments in, the investigation. *See, e.g.*, Def.'s Brief at 25–27 and attached declarations of agency investigators. Whatever may have been the agency's intent, the effects on the Former Employees were the same.

as December 12 (*see, e.g.* CSAR 730, 808), the agency did not engage counsel for the Former Employees for the first time until December 23 – the Friday before Christmas. *See* CSAR 853; *see generally* CSAR 851, 856–57, 859 (documenting early efforts by counsel for the Former Employees to reach out to agency); Pls.' Brief at Exh. 1 (same). Then, at 3:30 p.m. on December 23, with virtually no advance notice to the Former Employees or their counsel, the agency forwarded questions to be answered by the Former Employees, imposing a deadline of December 30. *See* CSAR 853, 859.

Moreover, the Labor Department agreed to forward for review by counsel for the Former Employees copies of the agency's questions to IBM and BP, as well as the companies' answers. But, although it later relented, the agency initially took the position that it would provide counsel for the Former Employees with copies of the companies' *answers* only *after* all information had been obtained from those sources. *See* CSAR 855, 857, 859. Further, particularly in the early stages of the investigation, the agency was slow to forward even copies of the BP and IBM *questions* to counsel for the Former Employees. *See generally* Pls.' Brief at 9.[20]

But what the Former Employees found most troubling was that the Labor Department never identified for them the criteria that it would apply to decide their fate until the agency issued its Third Negative Redetermination on Remand denying certification once again. *See generally* section IV.C, *infra*.

7. *The Third Negative Redetermination on Remand*

The Labor Department's Third Negative Redetermination on Remand both articulated a new, seven-criteria test for the "control" of leased workers, and applied that test to the Former Employees, reaffirming the agency's prior denials of TAA certification. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. 10,709–14, CSAR 1019–50.

According to the Labor Department, it sought on remand to "focus on articulating and applying objective criteria" for the exercise of operational control. Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. After reviewing the agency's prior Leased Worker Policy (set forth in its January 2004 memorandum), the agency determined that it was "appropriate to revise that policy, as an interim response to the issues raised in [the instant] proceeding,

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[20] Although the Labor Department provided counsel for the Former Employees with copies of the questionnaire responses of IBM and BP, the agency instructed counsel that those responses were confidential and therefore could not be shared with the Former Employees themselves. Thus, while IBM and BP had free access to the statements of the Former Employees, the Former Employees had no opportunity to review and comment on the factual representations made by their former employers, and counsel for the Former Employees was deprived of that potentially critical input. *See generally* Pls.' Brief at 26 n.9.

so that DOL policy more fully reflects potential real-world situations." *Id.* The Labor Department nevertheless noted that it expressly "retains the discretion to further revise [the] policy, so that the subject of 'operational control' can continue to receive close scrutiny as DOL undertakes rulemaking to update the regulations implementing the eligibility requirements of the Trade Act." *Id.*

The Labor Department advised that, "in response to the CIT's remand instructions," it had "re-evaluated the significance of a standard contract between the contractor firm and the subject firm." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. The agency reasoned that, "[g]iven the Department's focus on ascertaining *operational*, rather than formal, control," "the existence of a contract between the employer (such as a staffing agency, leasing agency or contractor) of a worker group and a producing firm is not an essential pre-requisite for the Department to determine that the workers in question are, in effect, joint employees or leased workers of the producing firm." *Id.* Under the agency's new rationale, "[t]he presence or absence of a contract would simply be one element, albeit an important one, in the Department's analysis." *Id.*[21] The agency also emphasized that, "[i]n all situations," terminated leased workers "must still have been engaged in activities related to production of an article produced by a firm" to be eligible for certification. *Id.*

The Third Negative Redetermination on Remand stated that the Labor Department had reviewed various relevant legal authorities, to develop seven criteria to be applied "to determine the extent to which a worker group engaged in activities related to the production of an article by a producing firm is under the operational control of the producing firm." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. Noting that "[t]he body of law involving joint employment or independent contractor status is complex and difficult to apply," the agency explained that it had "sought to distill that body of law into some basic principles, thus creating a test that is useable within the short statutory timeframes that govern TAA investigations." *Id.*

The seven criteria outlined in the Third Negative Redetermination on Remand are:

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[21] According to the Labor Department: "While a contract, where one exists, may provide strong evidence about the intended nature of the employment relationships between two firms, the Department will also review the operational conditions in which workers of an independent firm perform their functions for a producing firm." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.

1. Whether the subject workers were on-site or off-site of a facility of a production firm.[22]

2. Whether the subject workers performed tasks that were part of the producing firm's core business functions, as opposed to independent, discrete projects that were not part of the producing firm's core business functions.

3. Whether the production firm has the discretion to hire, fire and discipline subject workers.[23]

4. Whether the production firm exercises the authority to supervise the subject workers' daily work activities, including assigning and managing work, and determining how, where, and when the work of individual workers takes place. Factors such as the hours of work, the selection of work, and the manner in which the work is to be performed by each individual are relevant.

5. Whether the services of the worker group have been offered on the open market (*e.g.*, do workers of the subject group perform work that supports other clients?).[24]

6. Whether the production firm has been responsible for establishing wage rates and the payment of salaries to individual workers of the subject worker group.

7. Whether the production firm has provided skills training to subject workers.[25]

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[22] In the Third Negative Redetermination on Remand, the Labor Department noted that – although the January 2004 Leased Worker Policy provided for the certification of *on-site* leased workers only – "there may be circumstances where *off-site* leased workers . . . who provide support for production at a trade-impacted facility can satisfy the 'operational control' criteria to be eligible for TAA benefits." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712–13 (emphasis added).

The Labor Department determined that "co-location, while an important consideration [in determining control] . . . , is not the conclusive factor." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713. According to the agency, under the newly-articulated policy, "co-location" in effect "create[s] a strong presumption of control, so long as the workers are not engaged in activities completely unrelated to the work of the facility, such as selling extraneous items (*e.g.*, food) on-site and so long as other evidence does not demonstrate that the workers worked independently of the producing firm." *Id.*; *see also* 71 Fed. Reg. at 10,711 n.2 (employment at a production facility no longer a requirement for TAA certification).

[23] The Labor Department highlighted "[t]he discretion to hire, fire and discipline workers" as a "strong indicator of the level of control exercised by a producing firm on the employees of another firm." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713.

[24] According to the Labor Department, the fifth criterion – whether "workers of the subject group perform work that supports other clients" – is "another strong indicator" of control. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713–14.

[25] The Third Negative Redetermination on Remand identifies the seventh criterion – the

Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712 (footnotes added).

According to the Labor Department, none of the seven factors is "dispositive." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. Moreover, the agency recognized "that there may be cases in which evidence of every one of the criteria is not available." *Id*. Thus, the Labor Department indicated, in applying the new test, it intends to "look at such evidence as there is that goes to all these factors and . . . determine whether, on balance, the evidence supports a level of control by the producing firm that demonstrates that the workers of the contractor or secondary firm are, in fact, leased workers or joint employees of both firms." *Id*.

After setting forth its new, seven-criteria test for control, the Labor Department applied that test to the Former Employees. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712–14, CSAR 1035–50. According to the Third Negative Redetermination on Remand, the agency "made every effort to explore whether the [Former Employees] were under the operational control of BP as the first step in determining if they are entitled to certification." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711.

"In order to determine who exercised actual, operational control" over the Former Employees, the Labor Department looked to the BP-PwC/IBM contract "as a starting point, not the endpoint, for its inquiries." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711. The agency stated that, through its inquiries, it "sought to develop a true understanding of the 'real-world' relationship between [the Former Employees], IBM management, and BP employees/management." *Id*.

The Labor Department thus "sought to determine what constitute the 'practical realities' . . . of the relationship between [the Former Employees] and BP," by "[a]pplying the [seven, newly-established] criteria [for control] to the record evidence." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. The Labor Department acknowledged that "the petitioners, but not necessarily all former IBM employees at the Tulsa facility, had been BP employees prior to being outsourced in 2000 and that the outsourcing did not result in changes to their work assignments." *Id*., 71 Fed. Reg. at 10,711. The agency further conceded that "IBM's acquisition of PwC had no impact on the petitioners' work assignments." *Id*. In addition, the agency noted that "in 1999, the Department certified accountants formerly employed by BP in Tulsa as eligible for TAA because their work had been performed in support of trade-impacted production activity at BP facilities." *Id*.

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provision of training – as yet "another strong indicator" of control. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,714.

Nevertheless, reviewing each of its seven new criteria for control in turn, the Labor Department concluded that all of them weighed against the Former Employees. Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712–14, CSAR 1035–50. The agency therefore "affirm[ed] [its] original notice of negative determination of eligibility," denying certification of the Former Employees. Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,714.

Although *IBM I* expressly instructed the Labor Department on remand to "spell out with precision *all criteria* applicable to the Former Employees' potential certification as leased service workers" (*IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1345–47 (emphasis added); *see also id.*, 29 CIT at ___ n.38, 403 F. Supp. 2d at 1336 n.38), the Third Negative Redetermination on Remand addressed only the test for "control."

IBM I similarly directed the Labor Department on remand to "make determinations as to whether each of the criteria [for certification of leased workers] is satisfied in this case." *IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1347. The Third Negative Redetermination on Remand stated in passing that IBM's 2003 Annual Report "documented the manner in which IBM 'rebalanced' its staffing after acquiring PwC," and asserted that the information in the annual report "corroborates other record evidence which indicates that the staffing reductions at IBM's Tulsa Accounting Center had nothing to do with BP." Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711 n.3. And, elsewhere, the Third Negative Redetermination on Remand stated that "[t]he reasons that led to the layoffs [of the Former Employees' ex-colleagues] in 1999 [were] simply different from those present in 2003," so that "even if [the Former Employees] were deemed to be under BP's control, they could not be certified." *Id.*, 71 Fed. Reg. at 10,711. However nowhere did the Labor Department make a formal determination on any criteria for certification other than control. Instead, immediately following the analysis of the seven newly-articulated criteria for control of leased workers, the Third Negative Redetermination on Remand reaffirmed the agency's denial of the Former Employees' TAA petition.

Thus, as discussed in greater detail below, in these and other major respects, the Labor Department's Third Negative Redetermination on Remand failed to comply with the mandate of *IBM I*.

III. *Standard of Review*

Judicial review of a Labor Department determination denying certification of eligibility for trade adjustment assistance benefits is confined to the administrative record. *See, e.g.*, *Former Employees of Chevron Products Co. v. U.S. Sec'y of Labor*, 27 CIT 1135, 1142, 279 F. Supp. 2d 1342, 1350 (2003) ("*Chevron II*") (citations omitted). The agency's determination must be sustained if it is supported by substantial evidence in the record and is otherwise in accordance with

law. 19 U.S.C. § 2395(b); *Former Employees of Shaw Pipe, Inc. v. U.S. Sec'y of Labor*, 21 CIT 1282, 1284–85, 988 F. Supp. 588, 590 (1997) (citations omitted); *Former Employees of Merrow Mach. Co. v. U.S. Sec'y of Labor*, 18 CIT 17, 18–19, 843 F. Supp. 1480, 1481 (1994) (citations omitted).

The Labor Department's findings of fact are thus conclusive if they are supported by substantial evidence. *See Former Employees of Galey & Lord Indus., Inc. v. Chao*, 26 CIT 806, 808–09, 219 F. Supp. 2d 1283, 1285–86 (2002) (citations omitted); *Merrow Mach. Co.*, 18 CIT at 19, 843 F. Supp. at 1481 (*citing* 19 U.S.C. § 2395(b)). "However, substantial evidence is more than a 'mere scintilla'; it must be enough to reasonably support a conclusion." *Chevron II*, 27 CIT at 1143, 279 F. Supp. 2d at 1349 (*citing Galey & Lord Indus.*, 26 CIT at 808, 219 F. Supp. 2d at 1286 (citations omitted)).

Moreover, the evidence on which the agency relies does not exist in a vacuum. Thus, to determine whether substantial evidence exists, the record compiled by the agency must be reviewed "in its entirety, including all evidence that 'fairly detracts from the substantiality of the evidence.' " *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (citations omitted); *see also Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) ("[T]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." (citations omitted)); *Chevron II*, 27 CIT at 1143, 279 F. Supp. 2d at 1350 ("[A]n assessment of the substantiality of record evidence must take into account whatever else in the record fairly detracts from its weight." (citations omitted)).

Finally, all rulings based on the agency's findings of fact must be "in accordance with the statute and not . . . arbitrary and capricious"; to that end, "the law requires a showing of reasoned analysis." *Former Employees of Gen. Elec. Corp. v. U.S. Dep't of Labor*, 14 CIT 608, 611 (1990) (*quoting UAW v. Marshall*, 584 F.2d at 396 n.26).

In short, although it is clear that the scope of judicial review is narrow, and that a court is not free to substitute its judgment for that of the agency, it is equally clear that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Former Employees of Alcatel Telecomms. Cable v. Herman*, 24 CIT 655, 658–659 (2000) (*quoting Motor Vehicle Mfr.'s Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (citations omitted)).

Where good cause is shown, a case may be remanded to the Labor Department for further investigation and analysis. 19 U.S.C. § 2395(b); *see also Former Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360, 1362 (Fed. Cir. 2003) (citations omitted). Moreover, where circumstances warrant, the agency may be ordered to certify a group of workers, as "a remedy of last resort." *See Pittsburgh Logistics II*, 27 CIT at 1310, 1320 (ordering certification

where agency "continue[d] to adhere to a discredited position . . . at odds with the developed facts of record").[26]

IV. *Analysis*

The Former Employees challenge the Labor Department's Third Negative Redetermination on Remand – including its new Leased Worker Policy – on a number of grounds, substantive and procedural.

The threshold question is whether the Former Employees' TAA petition is properly subject to the Labor Department's new Leased Worker Policy. The validity of that new policy, and the sufficiency of the agency's articulated rationale, are also at issue.

Other arguments go to the Labor Department's substantive analysis of the specific facts of this case. The Former Employees claim that the remand investigation was lacking in transparency, and designed to reach a predetermined outcome. They also dispute the reliability of much of the evidence on which the agency relies, and they

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[26] *See also United Electrical, Radio and Machine Workers of America v. Martin*, 15 CIT 299, 308–09 (1991) (ordering certification of workers where agency used "protean reasoning to force its negative determination to fit whatever new facts come to light"); *Former Employees of Hawkins Oil & Gas*, 17 CIT at 130–31, 814 F. Supp. at 1115–16 (ordering certification where "another remand . . . would be futile"); *Former Employees of Barry Callebaut v. Herman*, 26 CIT 1044, 1058, 240 F. Supp. 2d 1214, 1228 (2002), *rev'd on other grounds*, 357 F.3d 1377 (Fed. Cir. 2004) (ordering certification where agency "failed to conduct an adequate investigation after four opportunities"); *Former Employees of Marathon Ashland Pipeline LLC v. Chao*, 27 CIT 820, 837, 277 F. Supp. 2d 1298, 1312–13 (2003), *rev'd on other grounds*, 370 F.3d 1375 (Fed. Cir. 2004) (ordering certification after multiple remands, where "[n]othing in the record indicates that [the company] will be more forthcoming if the court were to remand again" and "[n]othing in the record indicates that Labor has the resources or willingness to conduct an investigation beyond making inquiries" of the company).

The Government has argued in recent years that the Court lacks the authority to order certification. *See* Def.'s Brief at 14, 63–65; *BMC*, 30 CIT at ____ n.67, 454 F. Supp. 2d at 1347 n.67. To date, the Court of Appeals has side-stepped the issue. *See Former Employees of Marathon Ashland Pipe Line LLC v. Chao*, 370 F.3d 1375, 1386 (Fed. Cir. 2004) (finding, under the circumstances, "no occasion to address the government's argument that the remedy ordered by the [Court of International Trade] was outside [its] authority"); *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377, 1383 (Fed. Cir. 2004) (deeming moot "the question of the Court of International Trade's authority to order Labor to certify [workers]" for TAA benefits).

Indeed, the workers in *Barry Callebaut* specifically cautioned the Court of Appeals against writing the Labor Department a "blank check": "If Labor were correct that the Court of International Trade could do nothing other than affirm or remand, . . . the court would be powerless to do anything more than order a potentially endless series of futile remands, no matter how many times Labor failed to perform an adequate investigation" – "an 'absurd result.' " 357 F.3d at 1382–83. *Cf. Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006) (pointedly declining to endorse Government's claim that 19 U.S.C. § 1516a precludes Court of International Trade from reversing agency determinations in international trade cases and allows Court only to affirm or remand; emphasizing that "[i]t may well be that, in another situation, the trade court may be faced with [an agency] determination that is unsupported by substantial evidence, and for which a remand would be 'futile.' ").

maintain that the agency simply ignored evidence contrary to its determination.

In addition, the Former Employees contend that a criterion-by-criterion review of the existing record under the Labor Department's new policy demonstrates that they were indeed subject to BP's "operational control," and that the agency's determination to the contrary is unsupported by substantial evidence in the record. The Former Employees further contend that, because the agency failed to make determinations on any certification criteria other than control, their satisfaction of those criteria should be deemed conceded. The Former Employees conclude that – under the circumstances presented here – a fourth remand would be inappropriate, and court-ordered certification is the only just remedy.

Each of the Former Employees' challenges to the Labor Department's Third Negative Redetermination on Remand is considered below, in turn.

A. *The Potential Applicability of the Agency's Prior Leased Worker Policy*

As a threshold matter, the Labor Department apparently takes it as a given that the Former Employees' TAA claim is subject to the seven newly-articulated criteria for "control" set forth in the agency's latest Leased Worker Policy. But the issue is far from clear.[27]

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[27] *IBM I* did not instruct the Labor Department to develop an *entirely new* Leased Worker Policy or an *entirely new* definition of "control." Indeed, the starting point of the analysis in *IBM I* was the observation that – although both the Labor Department and the Former Employees appeared to assume that BP must have had "control" over the Former Employees for them to be eligible for TAA certification – the Labor Department's then-existing Leased Worker Policy did not identify "control" as a criterion for leased workers' certification. *See IBM I*, 29 CIT at ____ & n.10, ____ n.18, 403 F. Supp. 2d at 1317 & n.10, 1327 n.18 (*citing* Labor Department Internal Memo re: New Leased Workers Policy, CSAR 261–62).

IBM I also noted that it was not clear "whether – as a matter of practice – the Labor Department ha[d] consistently and uniformly required evidence of 'control' " in cases where it had applied its then-existing Leased Worker Policy. *See IBM I*, 29 CIT at ____ n.18, 403 F. Supp. 2d at 1327 n.18 (*quoting, inter alia*, a 2005 Fed. Reg. notice (stating that service workers eligible for TAA certification include "leased workers who perform their duties onsite at the TAA certifiable location on [an] established contractual basis")). *IBM I* further pointed out that, if indeed "control" was a criterion for leased workers' certification, *Pittsburgh Logistics* required the Labor Department to "define 'control' more broadly [than simply corporate ownership or affiliation], to include operational reality." *IBM I*, 29 CIT at ____ , 403 F. Supp. 2d at 1327. *IBM I* therefore directed the Labor Department, on remand, to "explain, *inter alia*, both its policy and its practice concerning 'control' as a criterion for certification of leased workers," and to explain "the precise meaning and significance" of various key terms used in the agency's then-existing Leased Worker Policy. *IBM I*, 29 CIT at ____ n.18, 403 F. Supp. 2d at 1327 n.18.

Similarly, *IBM I* noted that "there [was] much room for confusion as to precisely how the agency's classic test for certification as 'service workers' [was] to be interpreted and applied in light of the agency's [then-existing] Leased Workers Policy." *IBM I*, 29 CIT at ____ , 403 F. Supp. 2d at 1346. Accordingly, *IBM I* instructed that, on remand, the Labor Department

As a matter of simple fairness and equal protection (if nothing else), it would seem clear that the Labor Department should not hold the Former Employees to a higher standard than similarly- situated worker groups who sought – and were granted – TAA certification during the same general timeframe.[28] *See Former Employees of Mer-*

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was to "spell out with precision all criteria applicable to the Former Employees' potential certification as leased service workers," "explain[ing] the origins of and legal bases for all such criteria." *IBM I*, 29 CIT at ____ , 403 F. Supp. 2d at 1347. The end product was to be "a complete, self-contained statement articulating all agency criteria for TAA certification of leased workers," which was to be "a public document." *IBM I*, 29 CIT at ____ n.38, 403 F. Supp. 2d at 1336 n.38.

In sum – read properly, in context – the thrust of *IBM I* was to require the Labor Department to specifically identify, clarify and explain *all* criteria for certification of leased workers under its *existing* policy (as it was then being applied by the agency), to articulate the bases for that policy, to commit that policy to writing, and to publish it (to make it publicly available).

[28] The Labor Department also must take care to ensure that it is not – in effect – holding some workers to a *de facto* higher standard than others, by subjecting some workers' claims to significantly greater scrutiny.

For example, the Labor Department seeks to distinguish the facts of the instant case from those in *Pittsburgh Logistics*, asserting that the Former Employees here "were not part of a subdivision that was 'integrated into the [BP] corporate structure' and did not report 'directly to [BP] employees on all operational matters.' . . . Further, BP personnel did not manage 'all job tasks, direct[ ] which employees could work at specific locations and specifically relocate[ ] the [IBM] subdivision along with certain [BP] facilities * * * to [BP's] facilities, evaluate[ ] [IBM] employee job performance, and advise[ ] which [IBM] employees should receive merit salary increases.' " *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,714. But that argument is specious. The Labor Department is not quoting from the agency's own *findings* in *Pittsburgh Logistics*. Rather, the quotes are simply the *claims* of the workers in that case. *See Pittsburgh Logistics I*, 27 CIT at 352 ("The plaintiffs also claim . . . ."). Moreover, the Former Employees in the case at bar make virtually identical claims. There can be little doubt that – if the Labor Department had subjected the claims of the *Pittsburgh Logistics* workers to the kind of microscopic scrutiny accorded the claims of the Former Employees here – the agency would have found the relationship between the workers and the production firm at issue in *Pittsburgh Logistics* to be rather more nuanced (less clear-cut) than the agency now seeks to depict it.

Similarly, the Federal Register in which the Notice of Third Negative Redetermination on Remand was published included notices of several TAA investigations in which leased workers were certified – and, presumably, there have been other cases as well. *See, e.g.*, Cranford Woodcarving, Inc., Hickory, NC: Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance, 71 Fed. Reg. 10,709 (March 2, 2006); Lexel Co., Hutsonville, IL: Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance, 71 Fed. Reg.10,714–15 (March 2, 2006). There is no indication that these and other such cases have been subjected to the degree of agency scrutiny evidenced in the record of this case.

In addition, there is no indication that the Labor Department and its investigators recognize that – as a practical matter, particularly in leased worker cases – the more closely the facts of a particular case are scrutinized, the more ambiguous the case is likely to become (*i.e.*, the more likely it is that the agency will identify facts adverse to the petitioning workers). Whenever a denial of certification is appealed to the court, the facts of that case are (naturally) subjected to greater scrutiny by the agency. If the Labor Department fails to properly "discount" the evidence identified through its enhanced scrutiny in such cases (as compared to the cases where certification was granted) – that is, if the agency implicitly assumes that there were few or no adverse facts in the cases where it granted certification with relatively little investigation – then the Labor Department is, in effect, unfairly apply-

rill Corp. v. United States, 31 CIT ___, ___, Slip Op. 07–46 at 27 (Mar. 28, 2007) ("It goes without saying that similarly-situated claimants should be treated similarly under the law.") (citation omitted). Neither the Labor Department nor the Government has addressed this point directly. But, in a different context, the Government has asserted that – compared to other, prior iterations of the agency's Leased Worker Policy – the new Leased Worker Policy is more liberal, because it "*lowers* the burden for establishing eligibility [for TAA certification of leased workers] by eliminating the co-location requirement." *See* Def.'s Brief at 35.

At least in the case at bar, however, there is a powerful argument that, in fact, the Former Employees *were* "co-located" with the production firm at issue, BP. *See generally* section IV.D.3.a, *infra*. If the Former Employees indeed were effectively "co-located" with BP, then they may be eligible for certification "under the former leased worker policy, which looked only at whether there was a contract and whether the workers were on-site." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,714 (seeking to distinguish the case at bar from "the situation of the petitioners in *Former Employees of Wackenhut Corp. v. USDOL*, Ct. No. 02–00758" on the grounds that *Wackenhut* "was decided under the former leased worker policy, which looked only at whether there was a contract and whether the workers were on-site").

Accordingly, this matter must be remanded to permit the Labor Department to determine – following consultation with the Former Employees – whether the Former Employees' TAA claim should be "decided under the former leased worker policy, which looked only at whether there was a contract and whether the workers were on-site" (or, for that matter, some other prior formulation of the policy), or whether their claim is properly subject to the agency's latest Leased Worker Policy (or some variation of it). *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,714. The Labor Department

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ing a higher standard to leased workers who appeal the denial of their petitions.

The situation is only exacerbated if, when a denial of certification is appealed to the court, the Labor Department (consciously or unconsciously) seeks to elicit evidence to buttress its prior determination, rather than evaluating the case as a neutral, even-handed fact-finder charged with administering a remedial statute, conducting its investigation with the "utmost regard" for the interests of petitioning workers. *See* Pls.' Brief at 1 (charging that agency's remand investigation "was conducted to reach a predetermined negative result"), 5–7 (asserting that "Labor took the position of an advocate seeking to defend its prior decision, rather than the neutral fact-finder it was supposed to be"); Pls.' Reply Brief at 1–3 (arguing that agency's remand investigation was "outcome oriented," "intended to derive information aimed at supporting a predetermined outcome," and "designed to reach a negative determination").

It would be problematic, to say the least, if the Former Employees (or any other group of petitioning workers) were to show that the level of agency scrutiny varies greatly from one leased workers case to another, and that the difference in the level of scrutiny is a major factor in determining whether or not a particular group of workers is certified. The watchword is consistency.

shall set forth its rationale in the remand results, detailing all relevant legal and policy considerations, as well as the relevant facts.

B. *The Validity of the Agency's New Leased Worker Policy*

Even if the Former Employees' TAA claim is not subject to "the former leased worker policy, which looked only at whether there was a contract and whether the workers were on-site" (*see* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,714), or some other prior version of the policy, it does not necessarily follow that their claim is subject to the Labor Department's new Leased Worker Policy. The validity of that new policy has yet to be established.

As the Former Employees note, the Labor Department failed to provide the requisite reasoned analysis explaining and justifying its new policy. *See* Pls.' Brief at 18–19. It is black letter law that, although an agency is permitted to change its methodology in appropriate circumstances, the agency must nevertheless articulate a reasoned basis for the change. *See, e.g., British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997).[29] Moreover – quite apart from that generally-applicable tenet of administrative law – *IBM I* specifically directed that, on remand, the Labor Department was not only to "spell out with precision all criteria applicable to the Former Employees' potential certification as leased service workers," but also to "*explain the origins of and legal bases for* all such criteria." *IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1347; *see also* 29 CIT at ___ n.38, 403 F. Supp. 2d at 1336 n.38 (emphasis added).

Contrary to the instructions in *IBM I* (quoted above), the new Leased Worker Policy embodied in the Third Negative Redetermination on Remand is limited to the issue of control.[30] And, even as to control, the Labor Department's terse explanation leaves much to be desired. For example, the Labor Department stated that – in formulating its new seven-criteria test for "control" – it referred "to pertinent case law; to the Internal Revenue Code (26 U.S.C. § 3121(d)); to Revenue Ruling 87–41 and to the Restatement (Second) of Agency § 2, *Master*; *Servant*; *Independent Contractor* and § 220, *Definition of Servant* (1958)." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. The Labor Department represented that it found "the case law related to the 'economic realities' test particu-

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[29] *See also Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (agency changes in policy "must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate"), 817 (agency "must make [its] reasons known to a reviewing court with sufficient clarity to permit it to do its job").

[30] Because the new policy deals only with the issue of control (and does not speak to any other requirements for TAA certification of leased workers), it is a misnomer to refer to the policy as the "Leased Worker Policy." However, that is the terminology used by the Labor Department, and so – to avoid confusion – it is used here as well.

larly useful." *Id.* However, the agency specifically cited only a single case – *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) – and failed to identify any other "pertinent case law" that it consulted.

Similarly, the Labor Department did not explain why it chose to rely on certain legal authorities and not others, much less why it adopted only some of the criteria set forth in the authorities on which it chose to rely and rejected other criteria set forth in those same authorities.[31] Thus, for instance, the Labor Department proffered no explanation for its decision not to include among its seven criteria "the duration of the relationship between the parties" – one of the criteria listed in the excerpt from *Nationwide* that the agency quoted in outlining its new policy (and one that would appear to weigh heavily in favor of the Former Employees). *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.[32]

The Labor Department's statement of rationale is lacking in numerous other respects as well. For example, in citing *Nationwide*, the Labor Department noted that it was "a case arising under the Employee Retirement Income Security Act," intimating that the agency may have been cognizant that the differing public policies underlying different, but related, areas of the law may influence the substance of the law. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. But the agency's sparse rationale includes no discussion whatsoever of the subject. Certainly there is no indication that, in distilling principles from disparate bodies of law into its seven criteria, the Labor Department was mindful of the remedial nature of the TAA laws and its own obligation to act with the

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[31] According to the Government, the Restatement (Second) § 220 alone lists more than 10 criteria, and the IRS Revenue Ruling "includes a list of 20 factors." *See* Def.'s Brief at 33–34. The Government further asserts that the seven criteria set forth in the Labor Department's new policy "correspond to the factors used by the IRS as a guide and approved by the Supreme Court," and explains:

> Labor's first criteria corresponds to Factor 9 of the Revenue Ruling and Factor (e) of the Restatement. Labor's second criteria corresponds to Factor (h) of the Restatement. Labor's third criterion corresponds to Factors 19 and 20 of the Revenue Ruling. Labor's fourth criterion corresponds to Factor 1 of the Revenue Ruling and Factor (h) of the Restatement. Labor's fifth criterion corresponds to Factors 17 and 18 of the Revenue Ruling. Labor's sixth criterion corresponds to Factors 12 and 13 of the Revenue Ruling. Lastly, Labor's seventh criterion corresponds to Factor 2 of the Revenue Ruling

Def.'s Brief at 35. The Government's amplification of the Labor Department's new policy is arguably *post hoc* rationalization, however; and – more importantly – it simply underscores the fact that, for reasons that remain unexplained, the new Leased Worker Policy does not incorporate numerous criteria from the sources on which the agency says it relied.

[32] Contrary to the Government's assertion, the Former Employees emphatically do not "agree that . . . Labor's [seven newly-articulated] criteria for determining control are satisfactory." *Compare* Def.'s Brief at 32 *with* Pls.' Reply Brief at 5 n.4. Notwithstanding their dissatisfaction with the seven criteria, however, the Former Employees maintain that they can demonstrate that they meet them. *Id.*

"utmost regard" for the interests of the nation's displaced workers.[33]

Moreover, ignoring the explicit instructions in *IBM I*, the Labor Department's new criteria fail to provide for consideration of whether the leased workers in a particular case were previously employed directly by the production firm at issue (as they were in the case at bar). *IBM I* unequivocally directed that:

> [I]n both its articulation and its application of its policy vis-a-vis TAA certification of leased workers, the Labor Department should recognize and reflect (for purposes of its analysis of "control") the difference between standard, run-of-the-mill leased workers cases (where there was no pre-existing relationship between the leased workers and the company producing the trade-impacted article) *versus* cases – like this one – where the petitioning workers were "outsourced" by their initial employer [the production firm] and then immediately leased directly back to that company, as part of an outsourcing strategy.

IBM I, 29 CIT at ___ n.38, 403 F. Supp. 2d at 1336 n.38; *see also* 29 CIT at ___ n.20, 403 F. Supp. 2d at 1328 n.20.[34] The Labor Depart-

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[33] The Third Negative Redetermination on Remand does pay lipservice to "the remedial purposes of the Trade Act." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. But the sole reference to the remedial nature of TAA is in the context of explaining the Labor Department's "review[ ] [of] all record evidence" in reaching its determination in the Former Employees' case. *Id*. The reference has nothing at all to do with the agency's formulation of its new Leased Worker Policy. And, in any event, it is but a passing reference.

[34] *See also Pittsburgh Logistics I*, 27 CIT at 355 (noting that the fact that a particular group of leased workers had been "outsourced" by the production firm which now leased them "would strengthen the[ir] argument for eligibility" for TAA certification).

This highlights the problem at the heart of this case – the Labor Department's continuing failure to come to grips with the relatively unusual facts of this case.

In the typical outsourcing, a company outsources a particular function to a services firm at some other location. The outsourcing company's existing in-house staff who formerly handled the function are terminated, and are not necessarily hired by the services firm that assumes responsibility for the outsourced work.

In this case, *to ensure continuity*, BP not only outsourced a function, it also outsourced the Former Employees and other BP staffers who had been handling that function in-house for years (and, in some cases, for decades). Moreover, the outsourcing did not even result in a change of workplace for the Former Employees and the other outsourced workers. They did not move into PwC/IBM offices at some other location. Instead, for the convenience of BP, the Former Employees remained where they had always been located – near the BP Treasury, at the same desks, in the same building, doing the same work for BP that they had been doing for years. What BP wanted in the PwC/IBM outsourcing – and what BP got – was access to the same workers (the Former Employees and other outsourced BP staffers) without carrying them on the BP payroll.

In the course of the investigation, the Labor Department inquired as to the extent to which it is possible "for an[ ] employer to outsource employees and continue to receive the workers' services without being considered the outsourced workers' employer." *See* CSAR 919. As a threshold matter, the agency's question implicitly assumes an "either/or" situation – that is, that the workers either become "employees" of the services firm to which they are outsourced, or the workers effectively remain "employees" of their former employer. But

ment's rationale is inexplicably silent on the subject.[35]

The new Leased Worker Policy also suffers from a lack of clarity. For example, the policy includes numerous references to "operational control" as the key concept. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711–13. And, in at least one place, the language of the policy suggests that *shared* control of leased workers is sufficient to justify certification. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711 (referring to a situation where "a 'client' shares or has exclusive *operational* control over workers"). The policy also refers (with seeming approval) to "joint employment," "joint employees," and "joint employees of both firms" – though the policy fails to define or otherwise explain those terms (for example, to explain how they relate to "shared control").[36] *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.

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that is a false choice. As the Labor Department has previously acknowledged, the concept of "joint employment" is recognized in numerous areas of the law.

Further, there seems to be a value judgment inherent in the Labor Department's question. In other words, the question seems to assume that it *must* be possible for an employer to outsource its employees and yet continue to use their services but – at the same time – be deemed to have relinquished all "control" over them (so that they could never be eligible for certification as "leased workers"). But the basis for the Labor Department's inherent value judgment is unstated, and unclear. There appears to be no obvious reason why it would do violence to the TAA program to extend benefits to a group of workers who were outsourced by a production firm, but who continued to work exclusively for the former employer and whose livelihoods were tied to the health of the production firm.

In any event, the direct answer to the Labor Department's question is this: Not only are all outsourcing cases not the same (*i.e.*, most involve the outsourcing of only a function, not personnel as well), but it is also true that distinctions can be drawn even among the less common cases of outsourcing, where companies outsource both a function *and* the personnel who used to handle that function in-house. The Former Employees' case is at one extreme, and can be readily distinguished from other similar cases where (for example) the outsourcing results in a change of workplace location for the outsourced personnel, where the outsourcing results in fundamental changes in the nature of the workers' duties or their interactions with their former employer, or where – as a result of the outsourcing – the workers regularly handle work for a number of clients in addition to their former employer (so that their former employer becomes "just another client").

[35] Similarly, in its new Leased Worker Policy, the Labor Department states that – while it "has determined that the existence of a contract between the employer (such as a staffing agency, leasing agency or contractor) of a worker group and a producing firm is not an essential prerequisite" for certification – the presence or absence of such a contract would be an "important" element in its analysis. It is thus somewhat puzzling that the existence (or non-existence) of a contract is not included among the agency's criteria. Again, the Labor Department's rationale sheds no light on the matter.

[36] As *IBM I* explained, the Labor Department's then-existing Leased Worker Policy provided that "the existence of a standard contract between the contractor firm [*i.e.*, the leased workers' employer] and the subject firm [*i.e.*, the company producing the trade-impacted article] . . . should be considered sufficient evidence to prove *the existence of a joint employer relationship*." *IBM I*, 29 CIT at ____, 403 F. Supp. 2d at 1317 (*quoting* Labor Department Internal Memo re: New Leased Workers Policy, CSAR 261–62) (emphasis added). *IBM I* further noted:

Other than the [quoted] statement . . ., the Labor Department memorandum says little

Elsewhere, however, the language of the policy seems to indicate that leased workers may be certified only where the production firm has *exclusive* control. *See, e.g.*, Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711 ("DOL has made every effort to explore whether the plaintiffs were under the operational control of BP"), 10,712 ("For the former IBM employees to be found eligible, the Department must be able to establish that 'client' BP, not 'employer' IBM, exercised effective operational control over the workers' performance of their duties. In essence, DOL must determine whether the outsourcing of BP workers effectively transferred control over those workers to PwC/IBM."). These and other instances of the confusing use of critical terminology render the Labor Department's new policy substantially flawed.[37]

On remand, the Labor Department shall clarify and expand its new Leased Worker Policy, to address – at a minimum – the points outlined above, in addition to other points raised in *IBM I* which the policy does not presently address.[38] Finally, the revised policy shall be a public, "stand-alone" document (separate and apart from the agency's redetermination on remand analyzing the facts of the case at bar, but filed with it).

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about *the concept of a "joint employer" relationship*, except to incorporate by reference another memorandum – missing from the record . . . – which apparently discusses that concept at greater length. *See* Labor Department Internal Memo re: New Leased Workers Policy (CSAR 261–62) (referring to a "memorandum, dated November 21, 2003, requesting [a] decision on the issue of leased production vs. service workers" that apparently outlines options including a " '*joint employer*' *option* (Option 1)," which the new Leased Workers Policy purports to adopt with certain "important differences").

IBM I, 29 CIT at ____ , 403 F. Supp. 2d at 1318 (emphases added).

The Labor Department was expressly instructed, on remand, to "clarify not only its position on 'control,' but also on '*joint employer' relationships*." *IBM I*, 29 CIT at ____ n.38, 403 F. Supp. 2d at 1336 n.38 (emphasis added).

[37] *IBM I* previously criticized the Labor Department and the Government for similar inconsistencies in their statements of the applicable standard. *See generally IBM I*, 29 CIT at ____ n.19, 403 F. Supp. 2d at 1327 n.19 (noting that the Government's brief "variously restates the test for certification as whether IBM 'abdicated' control over the Former Employees or whether "IBM's role was relegated to mere 'nominal staffing,' " and contrasting such language with the Labor Department's then-existing Leased Worker Policy, which "expressly endorse[d] certification of leased workers where there [was] a 'joint employer' relationship") (citations omitted).

[38] The new revised policy shall also expressly address the extent to which that policy applies to leased *production* workers, as well as leased *service* workers. *Cf. IBM I*, 29 CIT at ____ & n.43, 403 F. Supp. 2d at 1339–40 & n.43 (discussing leased service workers vs. leased production workers, including citations to the Government's prior brief, which addressed the subject). *See also* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711 ("Thus, the client's exercise of *some* control does not establish that a 'client' shares or has exclusive operational control over workers employed by an unaffiliated *service* provider . . .") (third emphasis added).

C. *The Timing of the Agency's Issuance of Its New Leased Worker Policy*

The Former Employees characterize the Labor Department's standard for TAA certification in this case as "a constantly moving target." Pls.' Brief at 15. As they see it, "[a]s soon as the Former Employees submit evidence establishing their eligibility for certification pursuant to Labor's last articulated standard, Labor determines that the Former Employees are not eligible for certification based upon an entirely different certification standard." *Id.*; *see also* Pls.' Reply Brief at 2 (asserting that "Labor's 'moving target' approach is fundamentally unfair to the Former Employees and is inconsistent with Labor's mandate to conduct TAA investigations with the 'utmost regard' for the petitioning workers"). The Former Employees maintain that the most recent remand proceeding was no different.

The Former Employees assert that – notwithstanding their repeated requests during the course of the remand proceeding – the Labor Department "refused to explain the control standards upon which its decision would be based." Pls.' Reply Brief at 2, 4 & nn.1–2; *see also* Pls.' Brief at 10, 17. They point out that "[o]nly after Labor's [most recent] negative remand determination was filed with the Court did the Former Employees learn the test that determined their fate." Pls.' Reply Brief at 5. According to the Former Employees, "[b]ecause Labor did not notify the Former Employees of the existence of [its new] seven factor test until Labor issued its [most recent] decision denying the Former Employees' request for certification, it was impossible for the Former Employees to bring to Labor's attention pertinent information addressing each of the seven factors of the test." Pls.' Reply Brief at 6. Instead, the Former Employees "were left to submit information and analysis on control based on what became a superseded standard." Pls.' Brief at 17 (citation omitted). *See also* Pls.' Brief at 15–16 & n.7; Pls.' Reply Brief at 2, 4.[39]

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[39] The Former Employees express fear that, on remand, the Labor Department will "once again change the rules for certification, continuing to make it impossible for the Former Employees to demonstrate their eligibility for certification." *See* Pls.' Brief at 17. The Former Employees point with particular concern to the Third Negative Redetermination on Remand, where the Labor Department states that it expressly "retains the discretion to further revise [its Leased Service Worker Policy], so that the subject of 'operational control' can continue to receive close scrutiny as DOL undertakes rulemaking to update the [relevant] regulations." *See* Pls.' Brief at 17–18 (*quoting* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712).

However, as section IV.A above notes, it is not clear that the Former Employees are necessarily subject to certification standards that were not in place at the time of their termination. Moreover, any risk associated with potential future rulemaking is limited. "Retroactivity is not favored in the law." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Thus, as a general principle, regulations – like statutes – are not construed to have retroactive effect.

Anticipating the tandem problems of a standard that is a "moving target" and the result-

The Government emphasizes, in turn, that the Labor Department's new Leased Worker Policy "evolved as the [remand] investigation proceeded," and that "the policy was not finalized until the investigation was completed and the determination was being written." Def.'s Brief at 36; *see also id.* at 25 (the new policy "evolved as the investigation proceeded"). But that is no answer to the Former Employees' complaint. Even assuming that the Labor Department did the best that it could under the circumstances,[40] the Former Employees nevertheless had a right to know – in advance – the standard by which their claim would be judged, so that they might proffer relevant evidence before the agency rendered its decision.

On remand, the Labor Department shall ensure that the Former Employees have proper advance notice of the specific criteria to be applied to their claim, and that they have adequate opportunity to marshal relevant evidence and frame arguments tailored to those criteria for the consideration of the agency.

D. *The Agency's Analysis of "Operational Control" in This Case*

In its Third Negative Redetermination on Remand, the Labor Department first set forth its new seven-criteria test for operational control, and then applied those seven criteria to the facts of this case. The Labor Department concluded that each of the seven criteria weighed against the Former Employees, and reaffirmed its denial of certification. *See* Third Negative Redetermination on Re-

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ing need for repeated remands, *IBM I* instructed the Labor Department both to *identify* all applicable criteria for certification (not just the criteria for control), and to *make determinations on* all such criteria. *See IBM I*, 29 CIT at ____, 403 F. Supp. 2d at 1347 (directing agency to "spell out with precision all criteria applicable to the Former Employees' potential certification" and to "make determinations as to whether each of the criteria is certified in this case"); *see also BMC*, 30 CIT at ____ & n.65, 454 F. Supp. 2d at 1339–52 & n.65 (highlighting problem of " 'ping-pong' phenomenon, where a case repeatedly bounces back and forth between the Labor Department and the court as a result of the agency's standard 'piecemeal' approach to the investigation of TAA petitions").

Unfortunately, as discussed elsewhere in greater detail, the Labor Department's Third Negative Redetermination on Remand failed to comply with either of those two Court directives.

[40] Besides arguing that the newly-articulated criteria for control were not finalized until the Third Negative Redetermination on Remand issued, the Government also contends that the Former Employees "cannot reasonably claim to have been blindsided," because the criteria "merely formalized the factual inquiry that Labor had conducted" in the course of the remand proceeding. *See* Def.'s Brief at 35–36. However, as the Former Employees note, particularly under the circumstances presented here, it is far too much to expect that they "should have divined Labor's test from questions that it was asking of BP and IBM." *See* Pls.' Reply Brief at 3–4.

Moreover, the Government can't have it both ways. The Government cannot fairly argue that the Former Employees were effectively on notice of the seven criteria, and also argue that it was not possible to give the Former Employees notice of the criteria because they were not finalized "until the investigation was completed and the determination was being written." *See* Def.'s Brief at 36.

mand, 71 Fed. Reg. at 10,712 (listing seven criteria), 10,712–14 (agency's application of criteria to facts of this case); *see also* CSAR 1035–50 (unredacted version of agency's application of criteria to facts of this case). In contrast, the Former Employees maintain that, although they were deprived of proper advance notice of the Labor Department's newly-articulated criteria, the record evidence as a whole nevertheless demonstrates that the agency's latest seven-part test for control is satisfied in this case. *See* Pls.' Brief at 16 n.7, 19–31; Pls.' Reply Briefat 5 n.4.[41]

As discussed in greater detail below, the Labor Department's compilation and analysis of the record on remand was plagued with a number of overarching methodological problems which must be remedied by the agency, and which largely obviate the need to conduct a criterion-by-criterion review of the agency's determination at this time.[42]

1. *The Transparency and Fairness of the Remand Proceeding*

The Former Employees argue that the remand investigation was lacking in transparency, and that it was designed "to reach a predetermined negative result." Pls.' Brief at 1, 5–7, 8–11; Pls.' Reply Brief at 1–3.

Indeed, as outlined above, it is fair to say that the Labor Department never truly embraced *IBM I*'s encouragement to "engage in full and candid consultations with the Former Employees on all issues" on remand. *See* section II.B.6, *supra*; *IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1347. A number of the Former Employees' specific complaints are addressed elsewhere herein.[43] But the Former Employees' most serious charge is that the Labor Department has prejudged their case.

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[41] The Former Employees assert that – although the Labor Department describes its new seven-criteria test for control as a "balancing test" and states that none of the seven criteria is "dispositive" – all criteria are satisfied in this case. See Pls.' Brief at 19; Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.

[42] Other considerations also counsel against a criterion-by-criterion "substantial evidence" review of the Labor Department's determination at the present time. For example, it is possible that, in consultation with the Former Employees, the agency will conclude on remand that the Former Employees' claim should be subject to some prior iteration of the agency's Leased Worker Policy. *See* section IV.A, *supra*. It is also possible that, on reflection, the agency may modify its standard for control. *See* section IV.B, *supra*. Similarly, even if the Former Employees' claim is not subject to some prior version of the Labor Department's Leased Worker Policy, and even if the agency does not modify its standard for control, the agency must evaluate and reflect in its determination any additional evidence that the Former Employees may seek to adduce based on proper notice of the criteria by which their claim will be judged.

[43] *See, e.g.*, section IV.B, *supra (addressing the Former Employees' argument that the Labor Department failed to adequately explain and justify its new policy); section IV.C, supra* (addressing the Former Employees' criticism of the timing of the agency's issuance of its new policy); section IV.D.2.a(3), *infra* (addressing the Former Employees' exclusion from agency teleconferences, as well as their concerns about the accuracy of agency memoranda documenting those teleconferences).

Specifically, the Former Employees assert that, on remand, the agency failed to "act[ ] as a neutral fact-finder, gathering facts for a later, reasoned analysis," and – instead – "took the position of an advocate seeking to defend its prior decision." *See* Pls.' Brief at 6. The Former Employees contend that the agency's actions were "outcome oriented, with a policy [on operational control] being crafted around record evidence rather than record evidence being evaluated against an existing policy." Pls.' Reply Brief at 1.

Pointing to the Labor Department's representation that its new policy on control "was not finalized until the investigation was completed and the determination was being written" (*see* Def.'s Brief at 36), the Former Employees assert that the agency thus "admits that only after it gather evidence and finalized the record did it develop a policy." Pls.' Reply Brief at 2–3. According to the Former Employees:

> Labor "put the cart before the horse," framing its policy around the existing evidence. Indeed, Labor should have articulated its policy [and only] then, in consultation with all interested parties, investigated whether the facts of this case fit into that framework.

Id. at 3. The Former Employees conclude that "[t]he only explanation for Labor's investigative methodology on remand is that it was designed to reach a negative determination." *Id*.

The sequence of events on remand – with the Labor Department formulating its policy in parallel with its investigation of the facts of this case – is unfortunate, and did nothing to dispel whatever concerns the Former Employees might otherwise have harbored about the agency's ability to reconsider its prior determinations fairly and impartially. As the Government emphasizes, however, agencies are generally entitled to the benefit of a presumption of regularity, which is rebutted only by proof that the decision maker is "not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' " *See generally* Def.'s Brief at 20–21 (*quoting Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (citation omitted)); *see also NEC Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998) (standard is met "when the challenger demonstrates, for example, that the decision maker's mind is 'irrevocably closed' on a disputed issue") (citation omitted).

The fact that the Labor Department's new Leased Worker Policy was developed in parallel with the agency's investigation of the facts of this case does not alone suffice as the type of nearly "irrefragable" proof required to rebut the presumption of regularity. *See Sanders v. U.S. Postal Serv.*, 801 F.2d 1328, 1331 (Fed. Cir. 1986). But there are other factors that call the agency's impartiality into question even more directly.

For example, a comprehensive review of the administrative record reveals that, in its Third Negative Redetermination on Remand, the

Labor Department uniformly credited the information supplied by corporate sources over that provided by the Former Employees, and that – in those instances where corporate sources provided conflicting information – the agency virtually always accepted the version most adverse to certification of the Former Employees. These facts, which are unexplained by the agency, legitimately raise the spectre of bias and cast a long shadow over the agency's findings and determinations, particularly in light of the *ex parte* nature of TAA investigations and the Labor Department's obligation to act with the "utmost regard" for the interests of petitioning workers.[44]

2. *The Agency's Compilation and Analysis of the Record*

The Labor Department's Third Negative Redetermination on Remand reflects a number of methodological problems in the agency's compilation and analysis of the record on remand. As explained below, the most significant problems concern the agency's failure to take necessary measures to ensure the reliability of the evidence on which it relied, and the agency's failure to properly take into account countervailing evidence.

a. *The Reliability of Evidence*

In compiling the record on remand, the Labor Department failed to take adequate measures to ensure the reliability of the evidence on which it based its determination, in contravention of express instructions in *IBM I*, other relevant precedent, and sound administrative practice.

(1) *The Notices to BP and IBM Officials Mandated by IBM I*

In light of concerns about the reliability of information provided by corporate executives (in this case, as well as other TAA cases),[45] *IBM*

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[44] This is not the first time that the Labor Department has found itself on the receiving end of such criticism. *See, e.g., Pittsburgh Logistics I*, 27 CIT at 349 n.13 (where the court refers to the agency's "foregoing (or foregone) conclusion"); *Pittsburgh Logistics II*, 27 CIT at 1310, 1313 (where the court found that the agency's consideration of TAA petition was "results-oriented" and that agency's reasoning made its negative determination "appear predetermined"); *Former Employees of Murray Engineering, Inc. v. Chao*, 28 CIT ____, ____ n.7, 358 F. Supp. 2d 1269, 1273 n.7 (2004) (where court found it "simply disingenuous for the agency, upon learning that the HTSUS does not provide the result the agency appears to have already chosen, to now argue that it is inappropriate to refer to the HTSUS"); *United Elec., Radio & Mach. Workers*, 15 CIT at 309 (where court found that agency used "protean reasoning to force its negative determination to fit whatever new claims come to light").

[45] *See also BMC*, 30 CIT at ____, 454 F. Supp. 2d at 1328–37 (discussing "The Labor Department's Over-Reliance on Employer-Provided Information"; noting that "just as the Labor Department seems to impute to *petitioning workers* a motivation to stretch the truth in an effort to secure TAA benefits, so too *employers* have certain inherent incentives to be less than candid and fully forthcoming as well"; surveying relevant caselaw; and highlighting

I instructed the Labor Department to take measures to help ensure the accuracy of evidence obtained on remand:

> To help ensure the completeness and accuracy of information obtained on remand, the Labor Department shall expressly advise and assure all its contacts at IBM and BP that – unlike regular unemployment compensation, for example – the TAA certification of the Former Employees would involve no expense whatsoever on the part of the companies.
>
> To the same end, the Labor Department shall caution all contacts that they will be held personally accountable by the Court for all information that they provide in the course of the agency's investigation, whether their statements are oral or in writing, and even if they are not made under oath. *See, e.g.*, 18 U.S.C. § 1001 (federal material false statements statute).

IBM I, 29 CIT at ___ n.37, 403 F. Supp. 2d at 1336 n.37. *See generally BMC*, 30 CIT at ___ n.51, 454 F. Supp. 2d at 1331–36 n.51 (noting, *inter alia*, that Labor Department has elsewhere warned corporate executives, in writing, that they "will be responsible for the accuracy and completeness of the information" supplied in TAA investigation; and also noting that U.S. Department of Agriculture, Form FSA–229, "Application for Trade Adjustment Assistance (TAA) for Individual Producers" includes a notice cautioning applicants that "[t]he provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 641, 651, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to the information provided").

In their opening brief post-remand, the Former Employees pointed out that – notwithstanding the unequivocal language of *IBM I* – "[t]he record [on remand] demonstrates no effort by Labor to clarify [to representatives of BP and IBM] that TAA certification would not involve any expense to the companies." *See* Pls.' Brief at 7. In response, the Government filed a declaration by the agency investigator who was responsible for the remand investigation. Citing that declaration, the Government argues that, "[i]n Labor's discussions with the companies, it was apparent that they understood the effect of certification," and that "the senior attorney for BP confirmed that BP had been informed . . . that the companies would not incur any expense in the event of certification." *See* Def.'s Brief at 22 (*citing* declaration of agency investigator).[46]

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some of the various motivations that might influence corporations' responses to TAA investigations).

[46] Contrary to the Government's brief, there is nothing to indicate that "*BP* had been informed by . . . plaintiffs' counsel that the companies would not incur any expense in the event of certification." *See* Def.'s Brief at 22 (emphasis added). Instead, the agency investigator's declaration states that "petitioners' counsel brought the cost issue to [the] attention

The declaration of the Labor Department investigator is not part of the administrative record, however. Thus, the fact remains that there is *no evidence on the record* that the agency complied with *IBM I*'s mandate requiring the agency to "expressly advise and assure all its contacts at IBM and BP that . . . the TAA certification of the Former Employees would involve no expense whatsoever on the part of the companies." Moreover, it is no answer that the agency investigator "inferred from [her] conversation that IBM was already fully aware that any benefits provided . . . would be covered by Department, not IBM, funds." Declaration ¶ 2 (*cited in* Def.'s Brief at 22). It is not for the agency to decide that compliance with certain judicial directives is unnecessary under the circumstances.

More substantively, the agency investigator's declaration establishes that, in the course of the remand proceeding, the agency gave the notice at issue – at most – to a BP attorney and to an IBM attorney.[47] *See* Declaration ¶¶ 2, 14. The agency investigator's sole conversation on this issue with the agency's primary IBM contact did not take place until the Government was preparing its post-remand brief (*see* Declaration ¶ 14) – well after the agency had obtained all evidence from IBM, well after the remand proceeding had been concluded, and well after the Third Negative Redetermination on Remand had been filed with the Court. To serve the purpose of ensuring the reliability of information provided by corporate representatives, the notice mandated by *IBM I* had to be given to them before the agency requested evidence. *Post hoc* notice is simply ineffective.

Further, *IBM I* required the Labor Department to give the mandated notice to "*all* [*the agency's*] *contacts* at IBM and BP" – not just to its initial contacts. *IBM I*, 29 CIT at ___ n.37, 403 F. Supp. 2d at 1336 n.37 (emphasis added). Thus, to the extent that the Labor Department had contact with company representatives other than the lawyers who were its initial contacts at IBM and BP, the agency did not merely fail to *document* its compliance with *IBM I* – the agency *substantively* failed to comply with the mandate of the Court. *See, e.g.*, SAR 846 (identifying five BP officials who provided information for responses to agency questions); CSAR 758, 761, 977 (listing three

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[*of the agency's primary contact at IBM*] during one of their conversations." Declaration ¶ 14.

[47] The agency investigator's declaration actually gives no indication whether or not she gave the mandated notice to the IBM attorney. In relevant part, she states only that:

> I informed the legal departments of IBM and BP of the upcoming investigation and asked for their cooperation in providing responses to questionnaires and document requests. At BP, I spoke with . . . a BP attorney, describing the TAA program and BP's connection with this case. In particular, as required by the Court's Opinion, I told [the BP attorney] that TAA certification of IBM workers would not cost BP anything. *At IBM, I left a message with Mr.* [*name of lawyer*], *an attorney for IBM.*

Declaration ¶ 2 (emphasis added).

IBM officials who participated in teleconference with agency), 787 (noting that information in IBM's responses to agency's third set of questions was "primarily" provided by two IBM officials), 788 (naming two IBM officials who provided information for responses to agency's fifth set of questions), 792 (identifying two IBM officials who provided information for responses to agency questions), 972 (specifying two IBM officials who provided information for responses to agency's fourth set of questions), 993 (listing four BP officials who participated in teleconference with agency).

However ham-handed they may have been, the Labor Department apparently made at least some efforts to comply with *IBM I*'s requirement that the agency assure contacts at IBM and BP that TAA certification of the Former Employees would involve no expense on the part of the companies. In contrast, there is no indication whatsoever that the agency complied with *IBM I*'s requirement that the agency "caution all [IBM and BP] contacts that they will be held personally accountable by the Court for all information that they provide in the course of the agency's investigation." *See IBM I*, 29 CIT at ___ n.37, 403 F. Supp. 2d at 1336 n.37.

On remand, the Labor Department shall expressly advise and assure all of its contacts at IBM and BP, in advance, that – unlike regular unemployment compensation, for example – the TAA certification of the Former Employees would involve no expense whatsoever on the part of the companies. Further, to the extent that the agency's contacts at IBM and BP solicit information from other individuals within the companies in order to respond to the agency's inquiries, the agency shall ensure that all other such individuals receive the same advance notice and assurances.

To the same end, on remand, the Labor Department shall caution all of its contacts at IBM and BP, in advance, that they will be held personally accountable by the Court for all information that they provide in the course of the agency's investigation, whether their statements are oral or in writing, and even if they are not made under oath. Further, to the extent that the agency's contacts at IBM and BP solicit information from other individuals within the companies in order to respond to the agency's inquiries, the agency shall ensure that all other such individuals receive the same advance warning.

The Labor Department's compliance with these requirements shall be fully documented in the record of the remand proceeding.

(2) *The Agency's Assessment of the Reliability of Evidence*

In this case – as in many others – the Labor Department has displayed what is either an unwillingness or an inability to critically evaluate the reliability of evidence compiled in the course of its TAA investigations. *See generally* n.45, *supra*.

Time and time again, the Third Negative Redetermination on Remand expressly cites to and relies on information that is, on its face, suspect. For example, in reaching a determination in this case on the first of the seven new criteria for control, the key piece of evidence cited by the Labor Department is that – when asked whether IBM employees worked alongside BP personnel in Tulsa – an official of one of the companies responded: "There *may have been* times when a BP employee came to IBM's office in Tulsa . . ." *See* CSAR 1037 (citations omitted) (emphasis added). However, speculation is not reliable evidence. Moreover, the reason for the speculative nature of the corporate official's statement is unclear. Either the official was – for some unknown reason – playing coy, and deliberately seeking to downplay or minimize the facts of the situation (suggesting, for example, the possibility of bias), or the official lacked personal, first-hand knowledge of the relevant facts. But, either way, the statement is inherently unreliable.[48]

Similarly, in reaching its determination on another criterion, the Labor Department relied on a corporate official's statement that "BP employees in Tulsa did not share office space with IBM, though BP *may have had* office space on other floors in the same Tulsa office building." *See* CSAR 1046 (citation omitted) (emphasis added). In fact, the record is clear that BP and IBM were located in the same Tulsa office building. The reason for the speculative nature of the official's representative's statement, on the other hand, is entirely unclear. Again, either the official was – for some reason – playing coy, and deliberately seeking to obscure the facts of the situation, or the official lacked personal, first-hand knowledge of the relevant facts. Either way, however, the statement cannot be credited.[49]

The Third Negative Redetermination on Remand – and the admin-

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[48] *See generally BMC*, 30 CIT at ____ , 454 F. Supp. 2d at 1335 n.51 ("The reliability of information depends, in equal measure, both on the knowledge and authority of the source of the information, and on that source's honesty. If the Labor Department believes that BMC's Senior Manager for Human Resources actually did not know that her statements were false, it is entirely unclear (based on its experience in this and many other such cases) why the agency persists in treating employers' human resources executives as *authoritative, knowledgeable* sources in TAA investigations. If – on the other hand – the Labor Department believes that BMC's Senior Manager for Human Resources intentionally prevaricated, it is not only unclear why the agency continues to treat employers' human resources executives as presumptively *honest* sources, but it is also unclear why the agency apparently routinely permits them to lie with impunity.").

[49] In the course of the remand investigation, the Labor Department itself (quite properly) expressed concern about corporate officials' use of hedged, equivocating language in their responses to agency questions, noting that such language raises questions about whether the responses are "reasonably complete." *See, e.g.*, CSAR 779 (agency noted that "[w]ords like 'primarily' and 'typically' [in company's responses] suggest that there are other duties that have not been included in the [company's] response. Please consider those (and any similar) responses and revise them as necessary to include reasonably complete information."). As discussed above, the agency nevertheless expressly relied on questionable responses in reaching its determination.

istrative record in general – are replete with other comparable circumlocutions, which the Labor Department blindly and uncritically accepted at face value. *See, e.g.*, CSAR 1040 (stating that representatives of both IBM and BP acknowledged that "there *may have been* some interaction between IBM and BP employees") (emphasis added); CSAR 791 (source stated that, "during the course of the agreement, BP *might have* provided feedback on [IBM] employees (*e.g.*, BP *might have* requested that an employee [of IBM] be removed from its account if BP was not satisfied with such employee's performance)") (emphases added); CSAR 736 (source stated that "*it is possible* that the IBM workers assigned to perform services for BP would have been assigned to perform services for other clients") (emphasis added).

Statements such as those listed above should cause the Labor Department not only to discount the specific statements at issue, but also – more generally – to question the fundamental veracity of the quoted sources and the reliability of all information provided by them. Particularly given the remedial nature of the TAA statute, the *ex parte* nature of the Labor Department's investigative process, and the agency's obligation to act with the "utmost regard" for the interests of petitioning workers, the agency seems remarkably unconcerned as to whether or not the sources on which it relies are in a position to have personal, firsthand knowledge of the relevant facts,[50] and whether or not they have some bias that might undermine any evidence they provide.[51]

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[50] In the Third Negative Redetermination on Remand, the Labor Department stated: "As documented in the [Supplemental Administrative Record], DOL obtained cooperation from multiple IBM and BP officials, whose responsibilities and access to pertinent information made them sufficiently informed to be proper sources for the investigation. SAR 742, 761–764, 846." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711.

It is noteworthy, however, that the information provided by the corporate contacts on which the Labor Department relied was not submitted under oath. *See generally BMC*, 30 CIT at ____ n.51, 454 F. Supp. 2d at 1334–36 n.51 (discussing range of potential means to help ensure reliability of information provided in TAA investigation) (*citing, inter alia, Barry Callebaut*, 357 F.3d at 1383 (sustaining agency's denial of TAA certification, largely on the strength of sworn employer affidavits, which – the Court of Appeals emphasized – were submitted under solemn oath acknowledging liability for perjury; "those affidavits were sufficiently trustworthy to constitute substantial evidence")).

Moreover, contrary to the agency's implication, the agency did not consistently inquire as to the duration of its sources' employment with BP and/or PwC/IBM, or their position titles (much less their actual job responsibilities and the bases for their knowledge of relevant facts, particularly their familiarity with the situation of the Former Employees). Nor, in most instances, is there any indication in the record as to the locations of the agency's corporate sources. The Labor Department's principal contact at IBM appears to be located in New York – halfway across the continent from Tulsa. *See, e.g.*, CSAR 733. The locations of most of the agency's other corporate contacts are not clear. *See generally IBM I*, 29 CIT at ____ n.15, 403 F. Supp. 2d at 1322 n.15 (*quoting Pittsburgh Logistics I*, 27 CIT at 348 ("The Court does not presume that the [corporate] Employment Development Specialist . . . located in Rochester [New York] who responded to the [agency] investigator's

The Government emphasizes that the Court of Appeals has held that the Labor Department "is entitled to base an adjustment assistance eligibility determination on statements from company officials if the Secretary reasonably concludes that those statements are creditworthy and are not contradicted by other evidence." *See* Def.'s Brief at 59 (*quoting Marathon Ashland*, 370 F.3d at 1385). But the key word there is "reasonably." In the case at bar, there is no apparent basis on which certain key evidence can "reasonably" be deemed "creditworthy." *See generally IBM I*, 29 CIT at ___ n.27, 403 F. Supp. 2d at 1332 n.27 (cataloguing caselaw on evaluating the credibility and reliability of evidence in TAA investigations).[52]

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questions about the petitioners was 'in a position to know' the extent of the petitioners' jobs in Independence [Ohio].")).

[51] The Labor Department deprives itself of a valuable means of testing the credibility and reliability of evidence when it fails to allow petitioning workers to review and comment on information provided by company representatives. *See, e.g.*, Pls.' Brief at Exh. 2 (Labor Department fax coversheet warning that "all information and documentation submitted by companies in connection with this investigation is [to be] held in strict confidence and [shall] only be seen by the DOL, the Court and the lawyers involved in this matter"); Pls.' Brief at 26 n.9 (although agency provided counsel for Former Employees with copies of companies' responses to agency questions, agency stated that those responses included confidential information and therefore could not be shared with Former Employees themselves).

[52] *IBM I* noted that there was evidence in the record to "cast[ ] some doubt" on IBM's motivation to be fully candid and forthcoming in the TAA investigation, citing both to a statement by one of the representative Former Employees that "IBM is avoiding publicity as this type of situation (moving U.S. jobs overseas) has become a serious political issue," and to a copy of a New York Times article reporting on a conference call in which "two senior I.B.M. officials told their corporate colleagues around the world . . . that I.B.M. needed to accelerate its efforts to move white-collar . . . jobs overseas even though that might create a backlash among politicians and its own employees." *See generally IBM I*, 29 CIT at ___ n.26, 403 F. Supp. 2d at 1322 n.26.

The Government asserts that "suspicion that IBM company officials have an interest in misrepresenting facts merely because of a fear of bad publicity is unwarranted where the shift in production at issue would be at BP." *See* Def.'s Brief at 60. But there are at least two flaws in the Government's argument.

First, as the Third Negative Redetermination on Remand itself notes, the Former Employees have asserted in the past that *IBM* "was transferring the accounting services performed at the [Tulsa] facility to India and that 'Indians had been training at the [Tulsa] center all summer.' " *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,710. And, second, and more importantly, even if the only alleged shift in production was at BP, it would be naive in the extreme to think that IBM would have no interest at all in protecting a major client – BP – from adverse publicity and other potentially negative consequences. *See generally BMC*, 30 CIT at ___ , 454 F. Supp. 2d at 1331–37 (noting that Labor Department's views on reliability of company statements in TAA investigations are "simplistic and naive, at best").

The Labor Department's assessments of the credibility and reliability of evidence cannot be deemed "reasonable" and deserving of deference if the agency is as unsophisticated as it sometimes appears to be. In addition to the broad spectrum of corporate motivations and incentives outlined in *BMC*, *supra*, it is also significant that the Labor Department is a pervasive regulator, with wide-ranging jurisdiction over matters from wages and hours to occupational health and safety. Major multinational corporations such as IBM and BMC thus have a clear interest in "keeping the Labor Department (and other federal regulators) happy," and at least some incentive to "say whatever it is that the agency wants to hear." (In this case, for example, company representatives might well have logically inferred that

On remand, the Labor Department shall accord no weight to evidence which is based on "speculation" (such as that outlined above), and shall specifically consider whether – in light of the speculation – all other evidence offered by the source is similarly unreliable. In addition, the agency shall specifically evaluate the credibility and reliability of each piece of evidence on which it relies (including realistic assessments of the potential motivations and incentives of all sources), in accordance with the principles outlined above and the authorities cited there. The agency's determination on remand shall be based solely on evidence that is reasonably deemed credible and reliable pursuant to those principles.

(3) *The Accuracy of Agency Memoranda Summarizing Teleconferences*

The Former Employees note that the Labor Department's determination relies, in part, on memoranda prepared by the Labor Department investigator, which summarize teleconferences between agency personnel and other interested parties, including officials at IBM and BP, as well as counsel for the Former Employees. The Former Employees express concern that, "[u]pon receipt of the record, counsel for the Former Employees discovered inaccuracies in summaries of conversations they had with Labor." *See generally* Pls.' Brief at 11–14. The Former Employees acknowledge that "it is possible for parties to have different recollections of the *minor* details in conversations," but emphasize that "Labor's summaries contain errors involving *significant* details and call into question the reliability of all the summaries prepared by Labor – particularly because counsel for the Former Employees were denied the opportunity to participate in Labor's discussions with representatives from BP and IBM." Pls.' Brief at 13 (emphases added).[53]

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their corporate interests would be best served by providing information to support the agency's prior determination denying the Former Employees' petition for TAA certification. Accordingly, "IBM's and BP's consistent cooperation and responsiveness to the Department's inquiries" (*see* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711) is not necessarily the hallmark of credibility and reliability that the Labor Department here suggests.)

And corporations may have additional, unique motivations and incentives in "leased workers" cases such as this. They may be legitimately concerned about the collateral consequences – for purposes of taxes, health and retirement benefits, tort liability, and other areas of the law (above and beyond TAA certification) – of full disclosure of the true nature and extent of their "control" over workers who are not "employees" on their payroll. *See, e.g.*, CSAR 895–96 (BP-PwC contract provision specifically addressing such concerns). In the course of the remand investigation, in at least one instance, the Labor Department prefaced a question to BP with the comment: "The former IBM employees have characterized themselves as *de facto* employees of BP." *See* CSAR 817. Now *that* is a statement guaranteed to strike fear in the heart of any BP employment or tax lawyer.

[53] A review of one such summary makes it apparent to anyone with a solid command of the facts of this case that – at a bare minimum – the Labor Department investigator oversimplified the Former Employees' position in documenting a teleconference for the record.

The thrust of the Government's response is that the Former Employees "do not allege that any of the statements in the summar[ies] [are] factually wrong," but only argue "in essence . . . that the information [in the summaries] is *incomplete*." *See* Def.'s Brief at 27–29. And, according to the Government, the Former Employees cannot claim to have been harmed, because "to the extent the investigator did not transcribe every aspect of the telephone conversation [with counsel for the Former Employees], there is no danger of misinterpreting plaintiffs' position because all of their letters were subsequently placed in the record." Def.'s Brief at 28.

The Government's argument completely misses the point. Counsel for the Former Employees are not concerned about omissions in the Labor Department's memoranda summarizing the agency's teleconferences *with them*. They are concerned that there may well be *similar* omissions – potentially significant omissions – from the agency's memoranda memorializing its teleconferences *with representatives of IBM and BP*. And those memoranda are the only evidence of the teleconferences between the agency and the representatives of IBM and BP that is available to the Former Employees and to the Court.

As the Government pointedly observes, there is no authority for the proposition that private parties are entitled to participate in the Labor Department's teleconferences with company representatives. *See* Def.'s Brief at 13, 21. But that simply underscores the agency's obligation to ensure that those teleconferences are fully and accurately memorialized – with appropriate detail and nuance – for inclusion in the administrative record. In short, the written summaries prepared by the agency investigator must be much more than

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See SAR 904. Similarly, the agency elsewhere oversimplified (indeed, arguably misrepresented) the Court's position on the agency's procurement of the contract between BP and PwC/IBM. *See, e.g.*, CSAR 742 ("Judge Ridgeway specifically referred to contract, and it is DOL has the agreement on the record."), 744 ("As I indicated, Judge specifically requested the copy of the contract to be included in the files as it is very crucial for our investigation."); *compare IBM I*, 29 CIT at ____ n.36, 403 F. Supp. 2d at 1335 n.36 ("The Labor Department would be wise to obtain a copy of the [contract] between BP and PwC/IBM on remand here. If it fails to do so and nevertheless reaches a determination on 'control' that is adverse to the Former Employees, it must explain why it failed to obtain the document(s) in question . . ."). *See also* Def.'s Brief at Declaration ¶ 12 (attesting that, in teleconference with agency, counsel for Former Employees offered "to write the new policy [on control], because international trade regulation is his field of expertise"); *compare* Pls.' Reply Brief at Taylor Declaration ¶ 11 & Shaughnessy Declaration ¶ 5 (indicating that, in teleconference with agency, counsel for Former Employees never made such an offer, but did inquire whether Labor Department intended to issue draft determination for comment before issuing its final determination, as Commerce Department does in the international trade regulation cases with which counsel for Former Employees is familiar).

Of course, short of making *verbatim* records of its teleconferences with investigative sources *(see* n.54, *infra*), the Labor Department faces a challenge in documenting such teleconferences in an *efficient* fashion, while – at the same time – ensuring that the summaries it prepares are *fair, accurate*, and *complete*. But the agency's determinations can withstand judicial scrutiny only if the fundamental integrity of the agency's administrative record is beyond serious question.

mere *aides memoires* designed to later jog the recollections of those who participate in teleconferences; instead, the summaries must also serve to document all potentially relevant details of the conversations for the petitioning workers and the Court, who are *not* parties to the teleconferences.

On remand, the Labor Department shall not rely on information contained in any of the summary memoranda presently in the record, except to the extent that such information is expressly and specifically confirmed in writing (or on audiotape) by a representative of BP, IBM, or the Former Employees. Further, the agency shall take all measures necessary to ensure that future teleconferences between the agency and other parties (particularly representatives of BP and IBM) are fully and accurately preserved for the administrative record.[54]

b. *The Context of Questions Posed to Corporate Officials*

Because control was a key issue to be evaluated in the remand proceeding, the Former Employees criticize the Labor Department for "ask[ing] questions about 'control' without ever defining the term." Pls.' Brief at 16. Thus, the Former Employees note, "Labor left it to the discretion of whomever was answering the questions to define this critical term." *Id.* As the Former Employees cautioned the Labor Department during the course of the remand proceeding,[55] absent a definition by the agency, "it was impossible for Labor to obtain reliable information [from respondents, including BP and IBM] that was based on the correct definition of control." Pls.' Brief at 7.

The Former Employees illustrate their point with several examples. *See generally* Pls.' Brief at 16–17. For example, in one ques-

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[54] The means of documenting such teleconferences is left to the discretion of the Labor Department. In lieu of preparing detailed summary memoranda, of course, the agency may tape record its teleconferences, or allow counsel for the Former Employees to participate. However, even if counsel for the Former Employees are included as participants, all teleconferences must be memorialized for the administrative record in some reasonable fashion – whether by written memorandum, audiotape, or other appropriate means – to provide a basis for judicial review.

As an aside, it is worth noting that most, if not all, of the Labor Department's summary memoranda included in the record here fail to indicate the date on which those memoranda were prepared, and – instead – state only the dates (and, in at least a couple of instances, the time) of the subject teleconferences. *See, e.g.*, CSAR 742, 761, 852, 904, 993. But such memoranda cannot be presumed to be accurate, complete, and free of bias unless their preparation was reasonably contemporaneous with the teleconferences that they ostensibly document. *Cf.* Def.'s Brief at 27 (arguing that "Labor is not precluded from gathering information by telephone, and Labor reasonably memorializes these conversations by transcribing the conversation by hand and subsequently typing them [presumably, the handwritten notes] for placement in the record."). (The disposition of the handwritten notes taken by agency personnel is unclear; they are not included in the administrative record.)

[55] The Former Employees expressed their concerns during the course of the remand proceeding, both in phone conversations with the Labor Department and in a follow-up letter to the agency. *See* Pls.' Brief at 17; CSAR 996.

tionnaire directed to IBM, the Labor Department asked a series of questions about control, introduced by a statement that "The following questions cover the issues of 'control' and 'joint employer.' " However, no definition of "control" was provided by the agency. *See* CSAR 782. Even more problematic are those instances when the Labor Department simply asked company officials who controlled the Former Employees. *See, e.g.*, CSAR 731 ("Who had control over the workers of the subject firm at IBM's Tulsa, OK location? Please explain the nature and extent of that control."); CSAR 812 ("What control does BP exercise over workers of IBM Corp. in Tulsa, OK?").[56]

The Government asserts that "at every stage in the investigation, Labor asked *multiple* questions as to various aspects of the respective roles of the companies that relate to the issue of operational control," and maintains that "the factual questions [asked by the agency] provided the necessary context." Def.'s Brief at 22–23.

Unfortunately, although Labor Department personnel may have fully appreciated the "context" of the questions they posed, it is impossible to definitively say that representatives of BP and IBM necessarily would have done so. Nor is it clear why the agency did not limit itself to "the factual questions" that the Government now emphasizes, to avoid the confusion that the Former Employees fear and to avoid any claim that the "ultimate question" as to "control" of the Former Employees was decided *not* by the Labor Department but instead by IBM and BP. *Cf. IBM I*, 29 CIT at ___ n.33, 403 F. Supp. 2d at 1334 n.33 (emphasizing the importance of "the actual *facts* as to the practical realities of the exercise of day-to-day management and operational control over the Former Employees").

As the Government appears to acknowledge in its brief,[57] the Labor Department has been repeatedly chastised for its use of the types of conclusory questions that the Former Employees object to here, which may arguably – in effect – delegate to company officials the power to determine whether former employees are eligible for TAA benefits. *See generally BMC*, 30 CIT at ___ , 454 F. Supp. 2d at

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[56] The Former Employees also criticize the Labor Department for "ask[ing] leading questions of IBM and BP that were intended to derive information aimed at supporting a predetermined outcome." However, the Former Employees cite no examples of such questions. *See* Pls.' Reply Brief at 2; *see also* Pls.' Brief at 6. It is therefore unclear whether the "leading" questions at issue are the Labor Department's questions concerning "control" (discussed above), or whether the Former Employees are objecting to a different set of questions.

[57] The Government's Brief notes:

> [I]n *Former Employees of IBM Corp., Global Services Div.*, 387 F. Supp. 2d 1346, 1351–52 (2005), the Court rejected Labor's reliance upon the company's response that it did not produce an "article." The Court reasoned that the term "article" had legal significance and, therefore, Labor could not incorporate the company's representation without making a factual inquiry, and that to do otherwise would constitute an improper substitution of the company's opinion for the agency's. *Id*.

Def.'s Brief at 22.

1228–29.[58] But "it is Labor's responsibility, not the responsibility of the company official, to determine whether a former employee is eligible for benefits." *Former Employees of Federated Merch. Group v. United States*, 29 CIT ___ , ___ , 2005 WL 290015 at * 6 (2005) (citation omitted). Indeed, *IBM I* warned the Labor Department about this very point. *See generally IBM I*, 29 CIT at ___ n.25, 403 F. Supp. 2d at 1331 & n.25.

On remand, the Labor Department's determination shall rely only on evidence that is consistent with the jurisprudence outlined above. Moreover, to the extent that any respondent uses the term "control," the agency shall not rely on that evidence unless the meaning of the term *as used by the respondent* is clear beyond doubt on the record (*e.g.*, if the agency obtains clarification of the use of the term).[59]

c. *The Consideration of Countervailing Evidence*

Perhaps the most troubling aspect of the Third Negative Redetermination on Remand is the Labor Department's failure to even acknowledge – much less address – the significant body of record evidence that weighs against its negative determination. As the Court

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[58] *See also, e.g., EDS I*, 28 CIT at ____ , 350 F. Supp. 2d at 1292–93 (in relying on company official's statement that company "did not produce articles, but provided computer related services," agency improperly "substituted one . . . employee's opinion that the company did not produce 'articles' for [the agency's] own legal inquiry"); *Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, 28 CIT ____ , ____ , 2004 WL 2491651 at * 7 (2004) (agency erred in relying on company official's 'essentially legal conclusion' that workers "[*did*] *not produce a product*!"); *Ameriphone*, 27 CIT at 1617, 288 F. Supp. 2d at 1359 (*citing Former Employees of Marathon Ashland Pipeline LLC v. Chao*, 26 CIT 739, 744–45, 215 F. Supp. 2d 1345, 1352–53 (2002) (agency's reliance on employer's conclusory assertions concerning 'production' constituted impermissible abdication of agency's duty to interpret TAA statute and to define terms used in it)).

[59] The Former Employees argue that the Labor Department's failure to affirmatively define "control" essentially "permitted BP and IBM to presume that control meant *exclusive* control," which is a standard "much stricter than the joint control [apparently] allowed for under Labor's new seven-factor control test." Pls.' Brief at 33 (emphasis added). The Former Employees contend that the effect of the agency's failure was to contaminate the entire record, because "it is now impossible for Labor to unwind the mistaken control concepts that BP and IBM were permitted to adhere to without any guidance" throughout the most recent remand proceeding. *Id*. The Former Employees argue that another remand therefore would be futile. *Id*.

The restrictions imposed above are designed to address the Former Employees' legitimate concerns. To that end, the Labor Department also shall ensure that, on remand, all contacts at BP and IBM are affirmatively and specifically advised in advance – before any information is solicited from them – that, for TAA purposes, there are degrees of control (in other words, that "control" does not necessarily mean "exclusive control," that it is possible for two companies to exercise "joint control," and that it is possible for employees to be "joint employees," etc. – or whatever it is that the relevant Labor Department standard recognizes). In addition, in reaching its determination on remand, the Labor Department would be well advised not to rely on any evidence previously obtained that is arguably "tainted" by potential confusion as to the meaning of "control." Following the remand, the Former Employees will be free to argue that a particular finding is unsupported by substantial evidence, because of such potential confusion.

of Appeals has emphasized, "the substantial evidence standard requires more than mere assertion of evidence which in and of itself justified [the agency's determination], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. . . . Rather the substantialityof evidence must take into account whatever in the record fairly detracts from its weight." *Gerald Metals*, 132 F.3d at 720.

Indeed, in reversing the Labor Department's prior determination in this matter, *IBM I* sought to impress upon the agency its obligation on remand to consider *the record as a whole* and to confront countervailing evidence:

> To be sure, it is not the role of the Court in reviewing the Labor Department's determinations to re-weigh the evidence and substitute its judgment for that of the agency. But the Court is charged with determining whether or not the agency's determination is supported by "substantial evidence" in the record. *See* 19 U.S.C. § 2395. That analysis necessarily requires a review of the evidence on which the agency relies *in the context of the entirety of the administrative record as a whole* (including "whatever in the record fairly detracts from" that evidence). . . . Thus,evidence that – standing alone – might otherwise constitute "substantial evidence" may not measure up where, for example, the agency has taken the evidence out of context, or where (as here) there is substantial contradictory evidence in the record that the agency has failed to address.

IBM I, 29 CIT at ___ , 403 F. Supp. 2d at 1330–31 (*quoting Gerald Metals*, 132 F.3d at 720; *Consol. Bearings*, 412 F.3d at 1269); *see also id.*, 29 CIT at ___ , 403 F. Supp. 2d at 1336–37 (ordering agency – in reaching remand determination on "control" – to "ensure that its redetermination is supported by substantial evidence, *taking into consideration all other evidence that fairly detracts from its weight*") (citations omitted) (emphasis added).[60]

In its Third Negative Redetermination on Remand, the Labor Department ignored *IBM I*'s admonition. As the Former Employees succinctly put it, "for each of the seven factors of Labor's new control test, Labor cherry-picked the record for evidence that supports its decision and did not attempt to explain record evidence contrary to its position." Pls.' Reply Brief at 7; *see generally* Pls.' Brief at 1, 31; Pls.' Reply Brief at 1, 6–8.[61]

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[60] *See also IBM I*, 29 CIT at ____ , 403 F. Supp. 2d at 1324 (*citing Gerald Metals* and *Consol. Bearings*, and emphasizing that "the evidence on which the agency relies does not exist in a vacuum").

[61] *See also, e.g.*, Pls.' Brief at 20 (asserting that agency ignored various pieces of evidence related to BP's control of physical facilities of Former Employees' workplace), 21 (arguing that agency ignores evidence indicating that Former Employees' work activities were part

A determination that fails to take into account contradictory evidence – like the Third Negative Redetermination on Remand here – cannot withstand scrutiny under the "substantial evidence" standard.[62] There is, of course, no requirement that an agency's written

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of BP's core business functions, "presumably because [the evidence] was contrary to its predetermined conclusion"), 22 (stating that agency "ignored evidence contained in the Service Level Agreement"), 24 (arguing that, "in concluding that [BP] had no discretion over hiring, firing and discipline of workers, Labor blatantly ignored not only the provisions of the Outsourcing Agreement but also failed to consider the context of statements made by BP, IBM, and the Former Employees"), 24–26 (surveying relevant evidence, and asserting that, "in concluding that BP did not supervise the Former Employees' daily activities, Labor failed to 'tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn' ") (*quoting Gerald Metals*, 132 F.3d at 720), 28 (noting that "Labor failed to address evidence placed on the record by the Former Employees" which tends to contradict the agency's finding that they performed work on the open market), 29 (stating that "Labor reaches its conclusion [that IBM was responsible for matters such as establishing the Former Employees' wage rates] only after ignoring contradictory record evidence"), 29 (asserting that agency "fail[ed] to address contradictory record evidence" in concluding that BP did not train the Former Employees).

According to the Former Employees, the Labor Department's obligation to support its determinations with substantial evidence *based on the record as a whole* is properly viewed in the context of the remedial purpose of the TAA statute and the agency's obligation to act with the "utmost regard" for the interests of petitioning workers:

> Labor seemingly fails to recognize the remedial purpose of the statute in TAA cases. Not only must Labor support its determination with substantial evidence based on the whole record, including whatever in the record fairly detracts from the weight of the evidence, Labor must make its determination with the "utmost regard" for the petitioning workers. *Former Employees of Chevron Prods. Co. v. United States Sec'y of Labor*, 26 CIT 1272, 1274, 245 F. Supp. 2d 1312, 1318 (2002). In its third remand proceeding, rather than weighing record evidence with the utmost regard for the petitioning workers, Labor ignored evidence that fairly detracted from its negative determination. . . .[E]ven disregarding the remedial nature of the TAA statute (which is what Labor certainly did in this case), Labor's determination is unsupported by substantial evidence. *If Labor had properly accounted for the remedial nature of the statute, however, it would have weighed the record evidence and resolved any factual uncertainties in favor of the workers.* Thus, Labor's failure to take into account contradictory evidence is even more egregious when examined in light of the remedial purpose of the statute.

Pls.' Reply Brief at 7–8 (footnote omitted) (emphasis added).

[62] In the relatively few instances where it acknowledges evidence that weighs in favor of the Former Employees, the Labor Department tends to reflexively minimize or dismiss the evidence, asserting simply that it would be "typical of any service provider-client relationship." *See, e.g.*, Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713 ("As is normal in a service provider-client relationship . . . ," "in any service provider-client relationship . . . ," "where the relationship was that of client and independent service provider . . . ," "typical of what one might expect in a service provider-client relationship . . . ").

But the agency's mantra does not suffice to explain away the evidence, as a matter of logic or law. As *IBM I* observed (contrary to the Labor Department's implication), there is no truth to the notion that a "service provider-client" relationship is somehow inherently incompatible with – and fundamentally different from – an "agency" relationship. *See IBM I*, 29 CIT at ____ n.32, 403 F. Supp. 2d at 1334 n.32. Thus, that a particular piece of evidence might be "typical of any service provider-client relationship" does not mean that it is inconsistent with an agency relationship. Indeed, many service provider-client relationships *are* agency relationships. And many agency relationships have all (or at least most) of the indicia of a service provider-client relationship. In a sense, the difference is a matter not of *kind* but of *degree*.

determination dissect the record before it, adopting or explaining away each and every single piece of evidence, one by one. But the Labor Department must do much more than it has done in any of its determinations to date in this case, to satisfy its obligations under *Gerald Metals*, 132 F.3d at 720, and to provide a basis for judicial review.

3. *The Agency's Application of the Seven Criteria in This Case*

Because the overarching methodological problems in the Labor Department's compilation and analysis of the record, among other reasons, mandate remand of this matter once again, a comprehensive, exacting, criterion-by-criterion "substantial evidence" review of the Third Negative Redetermination on Remand is unnecessary. The observations below may nevertheless inform the remand proceeding, and advance the resolution of this case.

a. *The Location of the Former Employees*

The first criterion for control set forth in the Labor Department's new Leased Worker Policy is "[w]hether the subject workers were on-site or off-site of a facility of a production firm." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.

On remand, the Labor Department concluded that "the former IBM employees were not located at a BP facility of any kind." *Id*. at 10,713; *see generally* CSAR 1035–37. The Labor Department reasoned:

> The fact that IBM employees worked in the same location as they had when employed by BP and that BP maintained staff (*e.g.*, the BP Treasury unit) at the same street address where the former IBM employees had worked did not constitute co-location, because the IBM and BP facilities were completely separate, both physically (they were in different parts of the building) and functionally (for example, they had different telephone, computer and e-mail service).

Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713.

To put it bluntly, the Labor Department's pinched, formalistic analysis verges on intellectual dishonesty. The agency's determina-

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Further, if the new Leased Worker Policy on control is going to be the kind of line-drawing exercise that it appears it may be, it will not suffice for the Labor Department to tell workers (in effect), "No, *that*'s not it, but try again. We know it when we see it." *Cf. Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting, of obscenity, "I know it when I see it"). Admittedly, an analysis of control in a context such this is, by definition, "fact intensive," and necessarily requires that the agency "engage in a case-by-case analysis." *See IBM I*, 29 CIT at ____ , 403 F. Supp. 2d at 1333. However, fundamental due process requires that the agency give prospective petitioning workers *some reasonable idea* of where the line is – what constitutes "enough."

tion turns a blind eye to critical matters including the history of the Former Employees' relationship with BP, the legal relationships between PwC/IBM and BP at the time of the Former Employees' termination, the physical realities of the space at issue, and the seemingly obvious reason for the proximity of the offices of the two companies.

The Labor Department's analysis seems calculated to leave the impression that it is *pure happenstance* that IBM and BP at the time were (and perhaps still are) located in the same Tulsa office building. Nothing could be further from the truth.

It is undisputed that – in some cases for decades – the Former Employees were essentially "seated at the same desks, inside the same facility," throughout the time of their employment by BP, continuing through their outsourcing to PwC/IBM, and that they were "still sitting at the same desks in the same building doing the same work for the same company" at the time of their termination. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1313. The Labor Department fails to explain why – when BP outsourced the Former Employees and their work to PwC/IBM – the Former Employees' location did not change (and why it did not change thereafter). In addition, the agency's analysis fails to acknowledge that not only did BP contract with IBM for the supply of services by the Former Employees (and other IBM personnel), but BP also *subleased* to IBM the physical premises where the Former Employees delivered the services. *See, e.g.*, CSAR 742.[63]

The Labor Department's analysis of this criterion similarly ignores the percentage of the IBM/Tulsa office's work that was devoted to BP, as well as the fact that the Former Employees worked exclusively for BP. *See, e.g.*, CSAR 735, 777–78, 800, 1047 (percentage of

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[63] The Labor Department's statement that the facilities of IBM and BP were "completely separate, . . . in different parts of the building" also appears to be a distortion of the facts. *Cf. IBM I*, 29 CIT at ____ & n.34, 403 F. Supp. 2d at 1334–35 & n.34 (taking agency to task for "spinning" information to obscure facts of this case, and cataloguing various other TAA cases in which agency has been criticized by courts for distorting and misrepresenting information to detriment of petitioning workers).

As a threshold matter, it is far from clear that – for purposes of ascertaining "control" – offices "in different parts of the [same] building" could ever be fairly characterized as "completely separate." It is not as though the offices of IBM and BP are on different coasts of the U.S., or even in different parts of the city of Tulsa. *Cf. IBM I*, 29 CIT at ____ n.47, 403 F. Supp. 2d at 1341 n.47 (referring to fact that companies often have a number of different buildings on a corporate "campus"). Indeed, the record evidence indicates only that the offices of IBM and BP were *on different floors*. *See* CSAR 843. Further, there is no indication in the record that the offices of the Former Employees and other PwC/IBM personnel were any more physically distant from (*i.e.*, "separate from") the relevant BP offices *after* the outsourcing than they were *before* the outsourcing, when the Former Employees were employed directly by BP.

The numerous other relevant facts greatly diminish the significance of the Labor Department's finding of "different telephone, computer and e-mail service." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713. Even so, the agency apparently overstates the case at least a bit on that finding too. *See, e.g.*, CSAR 812 (discussing operation of BP server).

IBM's Tulsa workload devoted to BP); *IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1320 (Former Employees worked exclusively for BP).

Taken together, these undisputed facts constitute compelling circumstantial evidence that the location of the Former Employees was primarily for the convenience of BP,[64] and that the offices of the two companies were effectively "co-located." The Labor Department's tortured, form-over-substance analysis in the Third Negative Redetermination on Remand does nothing to dispel such a conclusion, and evinces a striking disregard for both the agency's obligation to act with the "utmost regard" for the interests of petitioning workers, and the remedial nature of the TAA statute.

b. *The Nature of the Former Employees' Work*

The Labor Department's second newly-articulated criterion for control is "[w]hether the subject workers performed tasks that were part of the producing firm's core business functions, as opposed to independent, discrete projects that were not part of the producing firm's core business." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.

On remand, the Labor Department concluded that "[t]he former IBM workers performed tasks that were not part of BP's core business functions." *Id*. at 10,713; *see generally* CSAR 1037–38. The agency further stated:

> While undeniably important, the accounting services performed by the workers in question are not part of BP's core business activities of oil and gas exploration and production, petroleum refining and marketing, and petrochemicals production, and are exactly the kind of non-core activities that many production firms have successfully outsourced or have performed by independent firms.

Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713.

It is unclear how the Labor Department could have determined that the Former Employees "performed tasks that were [not] part of the producing firm's core business functions," however, since the agency has made no finding on the nuts-and-bolts reality of the Former Employees' actual duties (instead characterizing them broadly as "accounting services"). In fact, record evidence indicates that the Former Employees' responsibilities included such tasks as "managing oil and gas production and related leases" for BP and "managing BP's production-related assets and equipment." *See IBM*

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[64] *See also* Third Negative Redetermination on Remand, CSAR 1045–46 (*quoting* CSAR 843) (indicating that convenience of BP was key factor in location of BP Treasury and certain other BP units in close proximity to offices of Former Employees and other relevant PwC/IBM personnel).

I, 29 CIT at ___ , 403 F. Supp. 2d at 1319–20 (citations omitted).[65]

Instead of seeking a working understanding of the true nature of the Former Employees' actual responsibilities and their real-world relationship to BP's "core business functions," the Labor Department predicated the entirety of its analysis of this criterion (however brief) on such "evidence" as quotes from a paid advertising section from *Business Week* magazine and other general articles about outsourcing. *See generally* Third Negative Redetermination on Remand, CSAR 1037–38; SAR 1001–02 ("Outsourcing the Finance Function," Finance Direct Europe), 1003–08 (Special Advertising Section, "Outsourcing for Strategic Advantage," Business Week), 1009–11 ("Savings Tip: Don't Do It Yourself," Business Week), 1012–16 ("Organizing for Performance: How BP Did It," Stanford Business Magazine), 1017–18 ("BP Amoco and PricewaterhouseCoopers Sign Canadian Outsourcing Contract," Alexander's Gas & Oil Connections). But information of that nature, without more, does not constitute substantial evidence.

c. *Hiring, Firing, and Discipline of the Former Employees*

The third criterion for control set forth in the Labor Department's new Leased Worker Policy is "[w]hether the production firm has the discretion to hire, fire and discipline subject workers." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. On remand, the Labor Department found that "BP had no discretion to hire, fire or discipline the IBM workers," adding that "[t]his finding . . . does not appear to be a matter of contention." *Id*. at 10,713.

To the contrary, the Former Employees vigorously dispute the agency's findings, maintaining that – "[a]lthough IBM was the principal employer of the Former Employees (*i.e.*, it cut their paychecks)" – BP retained a central role in personnel decisions. *See generally* Pls.' Brief at 22–24; *cf. IBM I*, 29 CIT at ___ n.21, 403 F. Supp. 2d at 1329 n.21 (noting previous instance in which Government boldly – and wrongly – claimed that Former Employees did not dispute a particular point).

The Labor Department's analysis of this criterion fails to address any of the Former Employees' major arguments. *See* Third Negative Redetermination on Remand, CSAR 1038–39. Nor does the agency

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[65] Nor can the Former Employees' work for BP fairly be characterized as mere "discrete projects" for the company. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. The record indicates that, at the time of their termination, the Former Employees were still sitting at the same desks in the same building doing the same work for BP that they had been doing for years (and, in some cases, decades). *See generally IBM I*, 29 CIT at ____ , ____ , 403 F. Supp. 2d at 1313, 1319–20. Indeed, in its remand determination, the Labor Department notes that the Former Employees were previously employed directly by BP, and candidly concedes that "the outsourcing did not result in changes to their work assignments." *See* Third Negative Redetermination on Remand at 10,711.

address specific contractual provisions on point, or their real-life, practical implications for the Former Employees and others at PwC/IBM who worked exclusively on BP matters. *See, e.g.*, CSAR 895–97 (Art. 12.2.2 (detailing terms and conditions of PwC/IBM's employment of outsourced BP employees); Art. 12.4 (concerning removal of PwC/IBM workers from BP's account)); Pls.' Brief at 23 (emphasizing practical implications of contract provisions); CSAR 756 (concerning requests for reassignment of PwC/IBM employees from BP account). The Labor Department's finding on this criterion thus is not supported by substantial evidence. *See generally* section IV.D.2.c, *supra*.

d. *Supervision of the Former Employees' Daily Work Activities*

The fourth of the Labor Department's seven new criteria for control is "[w]hether the production firm exercises the authority[66] to supervise the subject workers' daily work activities, including assigning and managing work, and determining how, where, and when the work of individual workers takes place. Factors such as the hours of work, the selection of work, and the manner in which the work is to be performed by each individual are relevant." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712 (footnote added).

On remand, the Labor Department concluded that "BP did not exercise the authority to supervise IBM workers' daily activities during the relevant period." *Id.* at 10,713; *see generally* CSAR 1039–46. According to the Labor Department:

> BP did not manage the individual IBM employees' work, nor did BP determine how, where, and when the work of the individual workers took place. Moreover, the investigation confirmed that while IBM personnel did interact with BP personnel to some degree, that interaction was limited and not managerial in nature. As is normal in a service provider-client relationship, BP outlined the work requirements, and IBM decided when, where, and who would do the work.

Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713.

But, yet again, there is no indication in the record that the Labor Department considered "the elephant in the room" – the Former Employees' long history of service in the direct employ of BP. Even though the record makes it clear that continuity was one of BP's main concerns in the outsourcing, the Labor Department failed to consider the extent to which the Former Employees' day-to-day responsibilities were established while they were still employed directly by BP.

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[66] The traditional formulation of this test focuses not on the *actual* exercise of authority, but – rather – on the *right* to exercise authority.

In addition, as with other criteria, the Labor Department here failed to take into account relevant contractual provisions and other significant evidence that contradicts its findings. *See generally* Pls.' Brief at 24–26; section IV.D.2.c, *supra*. Further, although the agency's analysis of this criterion is longer than its analysis of other criteria, it is no less superficial.

For example, the agency's finding that BP did not determine *where* the Former Employees and their PwC/IBM colleagues did BP's work is – as a practical matter – in tension with a number of the facts outlined in section IV.D.3.a (above), including the fact that BP sublet the office space at issue to IBM, and the fact that BP located certain of its facilities in close physical proximity to the Former Employees for BP's own convenience. Those facts arguably constitute persuasive circumstantial evidence that, in reality, BP strongly influenced "where . . . the work of the individual workers took place." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713.[67]

The Labor Department's analysis also states that "the apparent fact that BP and IBM personnel held regular meetings and corresponded by e-mail is not, in itself, indicative of 'control.' " Third Negative Redetermination on Remand, CSAR 1043.[68] But the relative frequency and the form of such contact might well be probative. It might well be significant, for instance, if the Former Employees and their contacts in the BP Treasury met and otherwise communicated with the same frequency *after* the outsourcing as they did *be-*

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[67] The frequency and form of interactions between the Former Employees and BP personnel are similarly probative of BP's influence over both *where* and *when* its work was done. Taken as a whole, the record facts belie any suggestion that the location and hours of the Former Employees were immaterial to BP, and that BP would have been just as happy to have the Former Employees and their PwC/IBM colleagues located in some far distant city. The record suggests that the opportunity for relatively frequent face-to-face contact and proximity to units such as BP Treasury were important. *See, e.g.*, SAR 843 (noting that BP Treasury was located in proximity to relevant PwC/IBM employees, for convenience of BP); CSAR 993–94 (location of BP Treasury driven by "the frequency of the interaction" with PwC/IBM personnel).

[68] Note 62 above observes that the Labor Department's determination tends to reflexively dismiss evidence that weighs in favor of a finding of control by characterizing the evidence as merely "typical of any service provider-client relationship." As explained there, however, it is not enough to conclude that some behavior is "typical of any service provider-client relationship." The fact that some behavior might be "typical of any service provider-client relationship" does not mean that it is not also indicative of "agency," and thus supportive of a finding of "control." The issue is less a matter of the nature of behavior or conduct, and more a matter of degree. Here, and elsewhere, the Labor Department repeatedly fails to consider the *extent* or *degree* of the behavior in question, in order to reach a reasoned determination as to whether or not it warrants a finding of control.

Similarly, in the finding quoted above, the Labor Department concluded that certain behavior (*i.e.*, holding regular meetings and corresponding by e-mail) is not "in itself" indicative of control. However, the question is not whether any single piece of evidence alone indicates control, but – rather – whether all the evidence taken as a whole does so. Logically, if the Labor Department proceeds to dismiss each piece of potentially significant evidence as insufficient "in itself," then – by definition – the agency cannot ever possibly find that BP exercised operational control over the Former Employees at the time of their termination.

fore – just as it might well be significant whether those communications were of a frequency and/or form to distinguish them from PwC/IBM's communications with the firm's other "clients." However, the record gives no indication that the Labor Department considered whether the Former Employees' outsourcing had any impact on the frequency and form of the communications they had with their contacts at BP, or whether life post-outsourcing was just "business as usual."[69]

The frequency and form of contact between the Former Employees and BP might bear as well on BP's influence over *how* its work was done. Similarly, the fact that the Former Employees were previously employed directly by BP (in some cases, for decades) is not irrelevant, because it effectively ensured (at least to some degree) how BP's work would be done. The Labor Department gave no consideration to these points either.

The Labor Department's analysis of this criterion did address the fact that the Former Employees were instructed to identify themselves as IBM employees acting on behalf of BP. *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,713; CSAR 1044–45. But the agency emphasizes that the instruction was to ensure that the former BP employees did not continue to represent themselves as BP employees. *Id*. But the agency's analysis misses the two most important points. First, the Former Employees' duties post-outsourcing were not limited to internal contacts; to the contrary, the Former Employees continued to represent BP's interests vis-a-vis third parties, just as they had done before the outsourcing. And, second, the instructions given to the Former Employees did not direct them to introduce themselves simply as IBM employees. Rather, they were instructed to introduce themselves as IBM employees *acting on behalf of BP. See* CSAR 817.

For these reasons, and others, the Labor Department's findings on BP's role vis-a-vis the day-to-day work of the Former Employees cannot be sustained on the existing record.

e. *The Exclusivity of the Former Employees' Work for BP*

The fifth criterion for control set forth in the Labor Department's new Leased Worker Policy is "[w]hether the services of the worker group have been offered on the open marked (*e.g.*, do workers of the

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[69] In some types of "leased worker" cases, it may be difficult for the Labor Department to gauge what constitutes a run-of-the-mill service provider-client relationship and what constitutes something more. In the case at bar, however, the norms of the Former Employees' direct employment by BP provide a "baseline." If (as to this criterion, and others) the Former Employees can establish that – as a practical matter – their experience post-outsourcing was little different from their experience while they were in the direct employ of BP, that would seem to constitute persuasive evidence that their post-outsourcing relationship with BP was no mere service provider-client relationship.

subject group perform work that supports other clients?)." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.

On remand, the Labor Department concluded that "the services performed by IBM workers were performed for clients other than BP." *Id*. at 10,713–14; *see generally* CSAR 1046–47. The agency acknowledged that "[t]he petitioners themselves may have worked only for BP," but stated that "this is not the case for the entire worker group." *Id*. at 10,714.

However, the Labor Department failed to explain the relevance of its reference to "the entire worker group" – which, read in context, apparently means all IBM workers at the Tulsa facility at the time of the Former Employees' termination (including those who were not terminated). It is not clear why the agency's focus extends beyond the work done by the Former Employees and other members of the petitioning worker group. And there seems to be no dispute that the petitioning Former Employees worked solely on BP matters.[70]

The only other piece of evidence that the Labor Department relied on in reaching its determination on this criterion was cited to support the proposition that it is "quite clear" that PwC/IBM was free to reassign its employees away from BP's account at any time. *See* Third Negative Redetermination on Remand, CSAR 1047. However, the agency fails to address relevant contractual provisions and other contrary evidence on point. *See, e.g.* CSAR 896 (contract provision concerning removal of certain PwC/IBM personnel assigned to BP's account); *see generally* Pls.' Brief at 26–28. Nor does the agency ad-

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[70] The Government states that "the relevant question is whether the separated workers . . . were exclusively working on the BP account." *See* Def.'s Brief at 55. But the point of the Government's argument is not clear. Surely neither the Government nor the Labor Department contends that *all* of the separated workers must have worked *only* for BP. Surely they do not contend that, if even a mere handful of the separated workers once did a few hours' work for a client other than BP, the agency would be entitled to find against certification of the petitioning workers as to this criterion.

At least at first blush, it would seem to be very difficult to reconcile such an extreme interpretation with the remedial purpose of the statute – as well as agency practice on other similar issues of interpretation. Thus, for example, when the Labor Department certifies worker groups, it does not first conduct a worker-by-worker investigation into the bases for each individual's termination. It is likely that in many – if not most – cases, at least some individuals terminated within the period at issue were terminated for performance issues or other non-trade related reasons. Yet that fact does not serve to preclude certification of the worker group; indeed, it doesn't even preclude an award of TAA benefits to individual workers who were terminated for non-trade related reasons.

In any event, as noted above, it appears to be undisputed that the representative Former Employees worked exclusively on BP matters. Moreover, the agency determination here under review includes no finding as to whether any of the other potentially certifiable former employees did any work for companies other than BP. *Cf. IBM I*, 29 CIT at ____ n.35, 403 F. Supp. 2d at 1335 n.35 (noting that "there is no evidence in the record . . . that *any* of the *displaced* IBM workers were among those who did work for companies in addition to BP"). Indeed, the only concrete evidence on point suggests that the vast majority of the PwC/IBM employees terminated in the relevant period were then working solely on BP matters. *See* CSAR 780.

dress the actual course of conduct of PwC/IBM and BP in the implementation of their contract – that is, the extent to which PwC/IBM employees who worked on BP's account in fact did (or did not) do work for other companies as well.

Like its findings on the other criteria, the Labor Department's findings on this criterion also fail the substantial evidence test.

f. *The Wages Paid to the Former Employees*

The Labor Department's sixth criterion is "[w]hether the production firm has been responsible for establishing wage rates and the payment of salaries to individual workers of the subject worker group." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712. On remand, the Labor Department concluded that "BP was not responsible for establishing wage rates or paying salaries to individual IBM workers." *Id.* at 10,714. The Labor Department further stated:

> This issue does not appear to be a matter of contention. The petitioners have indicated that PwC/IBM, not BP, set their wage rates and paid their salaries, once they were outsourced.

Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,714.

However, contrary to the Labor Department's assertion, the Former Employees in fact *do* dispute the agency's finding on this criterion. The Former Employees maintain that, although IBM cut their paychecks, BP retained a certain degree of control over personnel matters even after the Former Employees' outsourcing, and played a significant role in their performance reviews and in determining their compensation (including salary as well as bonuses). *See generally* Pls.' Brief at 28–29. Indeed, there are relevant contractual provisions and other record evidence that tend to support the Former Employees' claims; but the agency once again simply ignored it. *See, e.g.*, CSAR 895 (Art. 12.2.2, concerning salaries and benefits); Pls.' Brief at 28–29 (and evidence cited therein).

g. *Training of the Former Employees*

The seventh – and final – criterion for control set forth in the Labor Department's new Leased Worker Policy is "[w]hether the production firm has provided skills training to subject workers." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,712.

The Labor Department concluded on remand that "BP did not provide skills training to the workers of IBM." *Id.* at 10,714. That conclusion rested, in turn, on two findings – a finding that BP provided no training to the Former Employees, and a finding of "evidence that PwC/IBM provided training" to them. *See* Third Negative Redetermination on Remand, CSAR 1048–49. But neither finding can be sustained on the existing record.

The evidence cited to support the Labor Department's first finding strains credulity. *See* Third Negative Redetermination on Remand, CSAR 1048 (*citing* CSAR 777; SAR 844). It would be inherently incredible for BP to claim that it provided no skills training whatsoever to the outsourced workers even during the years that they were directly in BP's employ – in some cases, for decades. And the Former Employees were retained after the outsourcing precisely because they already possessed the knowledge and the skill set needed to understand the requirements of BP's business. *See* CSAR 777. In making its finding, the Labor Department thus ignored both common sense and record evidence explaining *why* BP provided no training to the Former Employees and their colleagues after they were outsourced to IBM.

The relevance of the Labor Department's second finding – that PwC/IBM provided training to the outsourced workers – is in doubt.[71] But, in any event, like the agency's first finding, this second finding too is unsupported by the existing record. The sole evidence cited is a very basic PwC handout addressing"Frequently Asked Questions," apparently prepared for the BP employees who were being outsourced to PwC. *See* Third Negative Redetermination on Remand, CSAR 1048–49 (*citing* SAR 69). It simply cannot bear the weight of the agency's finding.

In short, as the examples above illustrate, the Labor Department's findings applying its seven newly-announced criteria for control to the facts of this case are not supported by substantial evidence in the record. Therefore, even leaving aside the numerous other deficiencies in the agency's Third Negative Redetermination on Remand, that determination could not be sustained.

E. *The Agency's Failure to Make Determinations on Other Criteria for Certification*

As discussed elsewhere above, the Third Negative Redetermination on Remand includes no formal findings by the Labor Department on any criteria for certification of leased workers other than control, notwithstanding the Court's express directive to the contrary in *IBM I*, and the sound policy and practical reasons underpinning that directive. *See IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1347 (instructing agency to "make determinations as to whether each of the criteria [for certification of leased workers] is satisfied in

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[71] Contrary to the Labor Department's implication, there is no apparent reason why, as a matter of pure logic – even if PwC/IBM *did* provide training for them – the PwC/IBM workers might not also have received training from BP. As discussed above, however, the record evidence as a whole suggests that the knowledge and experience that the outsourced workers acquired while in the direct employ of BP ensured that they already had the skills needed to do the work that BP continued to require of them, rendering further training unnecessary.

this case"); n.39, *supra* (explaining that *IBM I* directive requiring agency to make determinations on all criteria was intended to avoid "ping-pong" phenomenon, where TAA case repeatedly bounces back and forth between agency and court as result of agency's typical piecemeal approach to TAA investigations).

The Former Employees initially sought to interpret the absence of agency findings on other certification criteria to mean that their satisfaction of those criteria was not disputed. *See* Pls.' Brief at 31–32 (caption of section of brief); *see also id*. at 3, 34–36; Pls.' Reply Brief at 1, 8–9, 11. The Government quickly disabused the Former Employees of that notion. *See* Def.'s Brief at 14, 61–63. But the Government never even acknowledged – much less tried to explain – the Labor Department's wholesale failure to make the findings that *IBM I* expressly required.

Instead, in the words of the Former Employees, the Government "embarks on an analysis of the record evidence in an effort to demonstrate that the remaining statutory criteria for certification have not been satisfied" – focusing, in particular, on the requirement for a "causal nexus" between workers' separation and either increased imports or a shift in production. *See* Pls.' Reply Brief at 8–9; Def.'s Brief at 14, 61–63 (*citing, inter alia, Former Employees of Hewlett-Packard Co. v. United States*, 17 CIT 980, 985 (1993)). But the arguments of litigation counsel are no substitute for the Labor Department's own reasoned analysis on the record. The Government's attempts at "backfill" must therefore be rejected as flagrant *post hoc* rationale. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (agency action must "be upheld, if at all, on the same basis articulated by the agency itself").[72]

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[72] As explained above, the Third Negative Redetermination on Remand's two brief, offhand references to the reasons for the Former Employees' termination do not constitute formal findings by the Labor Department. *See* section II.B.7, *supra*. Among other things, the agency's remand determination is utterly devoid of any analysis of the relevant evidence of record.

Moreover, even if the Labor Department had made a negative determination on "causal nexus" on remand, and even if the agency had sought to support that determination by itself articulating the analysis set forth in the Government's brief, it still would not pass muster, for several reasons.

First, and most importantly, in reaching its determinations, the Labor Department is obligated to take into consideration all record evidence, including that which weighs against the agency's conclusion. *See, e.g.*, CSAR 736 (IBM's response to question 16); SAR 913 (stating that Former Employees "were originally outsourced by BP as a cost-saving measure and . . . were eventually terminated because BP continued to require cost savings as a result of increased imports of oil and natural gas that competed with BP's U.S. production (and ultimately led to shifts in production)"); *see generally* section IV.D.2.C, *supra*. The Government's analysis here fails to do so. *See* Def.'s Brief at 61–63.

Further, the evidence cited by the Government as support for a negative determination on causation is largely conclusory, and thus does not merit great weight. *See generally* Def.'s Brief at 61–63. Mere denials have little probative value. And corporate double-speak is also virtually worthless. *See, e.g.*, CSAR 723–24, 761–62 (*cited in* Def.'s Brief at 61–62). In *BMC*,

The Labor Department is once again instructed, on remand, to make determinations on all applicable criteria for certification of Former Employees. Judgement is reserved as to the consequences of the agency's failure to comply with this and other instructions set forth in *IBM I*. *See Anderson v. U.S. Sec'y of Agriculture*, 30 CIT ___ , ___ , 469 F. Supp. 2d 1300, 1301 (2006) (ordering agency to show cause under Rule 11 for failure to comply with remand instructions in Ag-TAA case).

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for example, when asked to "[b]riefly explain the circumstances related to separations at [BMC], the company responded simply that the company had taken "significant restructuring actions, including reductions in force, to reduce its ongoing operational expenses to be in line with the revenue that [was then] currently being generated." *See generally BMC*, 30 CIT at ____ , 454 F. Supp. 2d at 1326–27 (citation omitted). The Labor Department was castigated for making "no effort whatsoever to plumb the meaning of [the company's] wholly uninformative response" to the agency's question. *Id*. As *BMC* observed:

> BMC's response to the Labor Department's question . . . was little more than a tautology, not illuminating in the least. . . . In essence, BMC responded that the company laid off workers to reduce expenses, so that expenses would not exceed revenues. But it is a virtual truism that companies strive to ensure that expenses do not exceed revenues, and that laying off workers reduces expenses. For purposes of a TAA analysis, the salient question is "why?": Why were [BMC's] revenues down? For example, were lower revenues attributable in part to increased imports?

BMC, 30 CIT at ____ n.32, 454 F. Supp. 2d at 1326–27 n.32.

So, too, the Labor Department cannot content itself here with bland assertions by corporate officials that lay-offs were simply the result of "rebalanced" staffing, or "restructuring" designed to "improve . . . services . . . at a better cost." And it is mere tautology to say that "changes in staffing levels were due to a reduction in the finance and accounting staff" or that "workers lost employment due to a reduction in the number of finance and accounting personnel." *See* Third Negative Redetermination on Remand, 71 Fed. Reg. at 10,711 n.3; CSAR 723–24, 761–62 (*cited in* Def.'s Brief at 61–62).

Finally, there is a distinctly hollow ring to the Government's criticisms of the Former Employees' evidence tying their termination either to increased imports or to a shift in production. *See* Def.'s Brief at 62. It is true that petitioning workers bear the burden of proof on their claim. But it is equally true that the TAA statute implicitly recognizes that the Labor Department has expertise and resources (not to mention subpoena power) that petitioning workers do not. The agency is thus "charged with an *affirmative* obligation to *proactively* and thoroughly investigate all TAA claims filed with the agency – and, in the words of its own regulations, to 'marshal all relevant facts' to make its determinations." *BMC*, 30 CIT at ____ , 454 F. Supp. 2d at 1357 (*citing* 29 C.F.R. § 90.12); *see generally id*., 30 CIT at ____ , 454 F. Supp. 2d at 1355–57. The Labor Department's obligation to act with the "utmost regard" for the interests of the Former Employees is in no way diminished by the fact that they are now represented by counsel.

To date, the Labor Department has largely failed to look behind the broad, generalized assertions of BP and IBM. Similarly, the agency has apparently failed to consider the possible motives and incentives that might bear on the companies' credibility (especially on this issue). *See* section IV.D.2.a(2), *supra*. Nor has the agency posed the obvious threshold questions point-blank, or confronted the companies with hard data concerning matters such as increased import levels and shifts in production. *See, e.g.*, CSAR 951 (summarizing certain data concerning increased imports of oil and natural gas, as well as data on shifts in production).

As things stand now, the Labor Department is derelict in its duty to investigate whether international trade was a factor in the Former Employees' termination; and the existing evidentiary record is simply insufficient to support a negative determination on that issue.

F. *The Remedy of Last Resort*

Particularly in light of the Labor Department's failure to make findings on certification criteria other than control, the Former Employees make out a compelling case for court-ordered certification. *See generally* Pls.' Brief at 32–35; Pls.' Reply Brief at 9–10.

The Former Employees argue that there is ample evidence in the administrative record demonstrating that they satisfy all applicable criteria, and that the record thus supports certification. *See, e.g.*, Pls.' Brief at 31–32, 34.

They reiterate that the Labor Department's criteria for certification have been "a constantly moving target," and posit that there is no reason to believe that – in a fourth remand proceeding – the Labor Department will not simply change the rules once again, "continuing to make it impossible for the Former Employees to demonstrate their eligibility for certification." Pls.' Brief at 17–18. They contend that another remand will be futile, because the Labor Department "poisoned the well" in the most recent remand investigation by failing to take necessary measures to ensure the reliability of evidence collected on remand (*see* section IV.D.2.a(1), *supra*), and by failing to put its questions into proper context by defining "control" for BP and IBM (*see* section IV.D.2.b, *supra*). *See* Pls.' Reply Brief at 10; Pls.' Brief at 33.[73]

They emphasize that continued delay in their receipt of TAA benefits diminishes the usefulness of those benefits. Pls.' Reply Brief at 10. They point out that the Labor Department "has now had four opportunities to develop and review the record" in this matter, and therefore "does not deserve another, fifth bite at the apple." Pls.' Brief at 33; Pls.' Reply Brief at 10. And they note that *IBM I* affirmatively put the Labor Department on notice that it was being allowed only "one last, very brief, remand." Pls.' Brief at 32–33; Pls.' Reply Brief at 9 (*quoting IBM I*, 29 CIT at ___ , 403 F. Supp. 2d at 1347). In short, according to the Former Employees, "[t]he time has come for the Court to order that Labor certify the Former Employees as eligible to receive TAA." Pls.' Brief at 1.

But, pointing to the language of the statute, the Government continues to insist that the Court lacks the power to order the Labor Department to certify workers in TAA cases. *See* Def.'s Brief at 14, 63–65. And there is at least some authority for that proposition. *See Merrill Corp.*, 31 CIT at ___ , Slip Op. 07–46 at 29 (Mar. 28, 2007) ("Even if Plaintiffs have satisfied all of the eligibility requirements for TAA certification under the Trade Act, this Court is powerless to

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[73] The Former Employees fear that, as a result of the agency's actions, it will now "be impossible for Labor to obtain information from the parties involved in this case that [does] not reflect the parties' previous, tainted positions." Pls.' Reply Brief at 10; *see also* Pls.' Brief at 33.

direct Labor to certify Plaintiffs as eligible for TAA. The Trade Act is clear. This Court may affirm Labor's determination or it may set aside Labor's determination in whole or in part, 19 U.S.C. § 2395(c), but this Court is not authorized to direct Labor to certify Plaintiffs as eligible for TAA . . .").

As explained above (*see* note 32), the Court of Appeals thus far has side-stepped this issue. *See Marathon Ashland*, 370 F.3d at 1386 (finding, under the circumstances, "no occasion to address the government's argument that the remedy ordered by the [Court of International Trade] was outside [its] authority"); *Barry Callebaut*, 357 F.3d at 1383 (deeming moot "the question of the Court of International Trade's authority to order Labor to certify [workers]" for TAA benefits). But a careful reading of the relevant precedent suggests that, if a case of court-ordered certification is to have any shot at surviving on appeal, it must be a clear-cut case where another remand would be plainly futile. *Cf. Nippon Steel Corp.*, 458 F.3d at 1359. Though it may be close, this is not (yet) that case.

V. *Conclusion*

For all the reasons set forth above, the Labor Department's Third Negative Redetermination on Remand cannot be sustained. Accordingly, out of an abundance of caution and in an exercise of restraint, this action is remanded to Defendant once again, for further proceedings not inconsistent with this opinion.

A separate order will enter accordingly.

FORMER EMPLOYEES OF INTERNATION BUSINESS MACHINES CORPORATION, *Plaintiffs*, v. U.S. SECRETARY OF LABOR, *Defendant*.

Court No. 04–00079

ORDER

Upon consideration of the U.S. Department of Labor's Third Negative Redetermination on Remand, 71 Fed. Reg. 10,709 (March 2, 2006), Plaintiffs' Comments thereon, Defendant's response, and Plaintiffs' reply, and in accordance with the Court's opinion issued this day in this matter, it is hereby

ORDERED that this action is remanded to Defendant for further proceedings not inconsistent with the opinion of the Court; and it is further

ORDERED that judgement is reserved as to the consequences of Defendant's failure to comply with the instructions of the Court in *Former Employees of Int'l Business Mach. Corp.*, 29 CIT ___ , 403 F. Supp. 2d 1311 (2005); and it is further

ORDERED that the parties shall confer with one another, and – no later than April 9, 2007 – Defendant shall notify the Court of several alternative, mutually-convenient dates and times in the week of

April 23, 2007 when all counsel (including counsel at the Department of Labor) are available to appear before the Court at a hearing to be convened to discuss the schedule and structure of the remand proceeding in this matter.

Slip Op. 07–52

AIRFLOW TECHNOLOGY, INC., *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 02–00099

[Plaintiff's motion for summary judgment is denied; Defendant's cross-motion is granted.]

Decided: April 2, 2007

Rodriguez O'Donnell Ross Fuerst Gonzalez Williams & England, P.C. (*Thomas J. O'Donnell* and *Lara A. Austrins*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mikki Graves Walser*); *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

At issue in this action is the tariff classification of twenty-one entries of filter media imported from Italy through the Port of Chicago in 1998 and 1999. The imported merchandise is installed in paint spray booths in automotive body shops, in industrial finishing operations, and in the aerospace industry, to filter air flowing into areas where painting operations take place.

The U.S. Customs Service liquidated the imported merchandise under subheading 5911.40.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"),[88] which covers "Textile products and articles, for technical uses, specified in note 7 to this chapter: Straining cloth of a kind used in oil presses or the like, including that of human hair," at a duty rate of 11% *ad valorem* in 1998 and 10.5% *ad valorem* in 1999.

In the protest that it filed with Customs, plaintiff importer Airflow Technology, Inc. asserted that the merchandise was properly classifiable under heading 5911 − specifically, subheading 5911.90.00,

[1] All references herein are to the 1998 version of the HTSUS, which is identical to the 1999 version in all relevant respects.

which covers "Textile products and articles, for technical uses, specified in note 7 to this chapter: Other" – dutiable at the rate of 6% *ad valorem* in 1998, and 5.6% *ad valorem* in 1999. However, Airflow now claims classification under subheading 5603.94.90, a duty-free provision which covers "Nonwovens, whether or not impregnated, coated, covered or laminated: Of man-made filaments: Weighing more than 150 g/m^2: Other: Other." Only in the alternative does Airflow seek classification under subheading 5911.90.00.

Cross-motions for summary judgment are pending. *See generally* Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Brief"); Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment ("Pl.'s Reply Brief"); Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendant's Cross-Motion for Summary Judgment ("Def.'s Brief"); Defendant's Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment ("Def.'s Reply Brief").

Jurisdiction lies under 28 U.S.C. § 1581(a). Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640.

For the reasons set forth below, the merchandise at issue is properly classified under HTSUS subheading 5911.40.00, "Textile products and articles, for technical uses, specified in note 7 to this chapter: Straining cloth of a kind used in oil presses or the like, including that of human hair." Airflow's Motion for Summary Judgment is therefore denied, and the Government's Cross-Motion is granted.

I. *The Merchandise At Issue*

The commercial invoices that accompanied the entries describe the merchandise at issue as "media filtration," "Sperifilt 6/65," and/or "Sperifilt 6/50" ("Sperifilt filter media"). Sperifilt filter media is manufactured by Speritex S.P.A. of Brusnengo, Italy. *See* Joint Statement of Material Facts As To Which There Is No Genuine Issue To Be Heard ("Joint Statement of Facts") ¶¶ 3–4.

Sperifilt filter media is designed for use, manufactured for use, and actually used for air filtration in paint spray booths, to filter dust and other suspended solid particles out of the air flowing into all areas where painting operations take place. Paint spray booths are used in industries where high quality paint finishes are required, such as automotive body shops and industrial finishing companies (where products such as furniture and equipment are painted), as well as in the aerospace industry (where they are used in painting aircraft). A paint spray booth is a totally enclosed structure designed to provide a clean and safe working environment to meet the painting needs of industrial processes. Typically located in-

side a building, a booth is a sheet metal structure with doors, fans, and elaborate ductwork. *See* Joint Statement of Facts ¶¶ 16, 18–22.

Together with ductwork and fans, Sperifilt filter media works to filter the air in paint spray booths, to keep articles clean and free of solid particles throughout the painting process. The filter media is installed in a paint spray booth wherever the supply air enters the booth − most commonly, in the ceiling. Fans and ductwork are used to push the supply air (air outside the paint spray booth) into the finishing area of the paint spray booth, and the filter media diffuses and filters the air to create a uniform, clean airflow over the finishing operation. *See* Joint Statement of Facts ¶¶ 23–25.

Sperifilt filter media is made up of three basic components: a high-loft, nonwoven medium made of polyester thermobonded fibers; a polyester yarn backing net; and a tackifying substance (*i.e.*, an adhesive). Speritex uses the same basic process to manufacture all types of the product. The only variables are the quantities and percentages of components used. *See* Joint Statement of Facts ¶ 11.

First, polyester staple fibers of different sizes are carded, to form uniform sheets of fibers. Several sheets are then layered, to achieve a specific weight and thickness sufficient to create a filter medium that progressively increases in density in one direction (the direction of the intended airflow), so that air will pass through the filter from the less dense portion through progressively denser portions, thus filtering out progressively smaller particles. After the layers are thermally bonded together, the filter medium is impregnated with a tackifying substance (*i.e.*, an adhesive). The tackified filter medium is then bonded to a backing (a net of polyester yarn) on the side of the finished product where the flow of filtered air will exit. The net backing ensures dimensional stability under high temperature conditions, and helps prevent fibers and particles from escaping. The result is a high-loft, nonwoven filter medium that captures particles of disparate sizes at different depths of the medium. *See* Joint Statement of Facts ¶¶ 12–15. According to Airflow, the finished product − the imported filter material − is produced in rolls that are approximately 66 feet long and between 22 and 81 inches wide. *See* Wittert Supp. Aff. ¶¶ 4–5.

Sperifilt filter media filters the air by capturing solid particles in two separate ways. First, the structure of the filter media − which progressively increases in density in the direction of the airflow − permits solid particles of disparate sizes to attach to the fibers at different depths as air is pushed through the filter. In addition, because the filter media is impregnated with a tackifying substance, smaller solid particles that are not captured by the fibers themselves during the first part of the filtering process are later caught by the adhesive component of the filter media (the tackifying substance). Because it incorporates two means of capturing solids, Sperifilt filter media

traps solid particles ranging in size from 8 to 100 microns from the air that is drawn or pushed into the booth. *See* Joint Statement of Facts ¶¶ 26, 28.

According to Airflow, as a practical matter, Sperifilt filter media cannot be used to filter liquids from solids. Wittert Aff. ¶ 28.

II. *The Standard of Review*

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to . . . judgment as a matter of law." USCIT R. 56(c).

Customs' classification rulings are reviewed through a two-step process: first, construing the relevant tariff headings, which is a question of law; and second, determining whether the merchandise is properly classified under the headings, which is a question of fact. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Thus, in classification cases, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb*, 148 F.3d at 1365 (citations omitted).

Although the parties to this action argue for classification under different provisions, there are no genuine disputes of material fact. The matter is therefore ripe for summary judgment.

III. *Analysis*

Merchandise imported into the United States is classified for tariff purposes under the HTSUS. Classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation ("ARIs"). *See, e.g.*, *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998); *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). The GRIs and the ARIs are part of the HTSUS,[89] and are considered to be statutory law for all purposes. *See* 19 U.S.C. § 1204(a), (c).

The GRIs are applied in sequential order. Most merchandise is classified pursuant to GRI 1, which states that "classification shall be determined according to the terms of the headings and any relevant section or chapter notes and, provided such section or notes do not otherwise require, according to [GRIs 2 through 6]." Also relevant here are GRI 3 and GRI 6. GRI 3 governs the tariff treatment of goods that "are, *prima facie*, classifiable under two or more headings." And GRI 6 addresses classification at the subheading level.

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[2] The HTSUS consists of the General Notes, the General Rules of Interpretation ("GRIs"), the Additional U.S. Rules of Interpretation ("ARIs"), sections I through XXII (chapters 1 to 99, including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto), and the Chemical Appendix.

A.

The Government does not dispute that Sperifilt filter media is *prima facie* classifiable under HTSUS heading 5603, the general provision for "Nonwovens, whether or not impregnated, coated, covered or laminated" – the classification that Airflow seeks. *See* Heading 5603, HTSUS; Def.'s Brief at 13. The Explanatory Notes to heading 5603 elucidate the scope of that heading, and specifically refer to "sheets for filtering liquids or air." *See* Explanatory Notes, Heading 5603 at 853. But the Explanatory Notes make it equally clear that merchandise otherwise within the scope of the heading is excluded from classification thereunder if it is "covered more specifically by other headings":

> *Except where they are covered more specifically by other headings in the Nomenclature*, the heading covers nonwovens in the piece, cut to length or simply cut to rectangular (including square) shape from larger pieces without other working, whether or not presented folded or put up in packings (e.g., for retail sale). *These include*: facing webs (overlay) for incorporation in laminated plastics; top-sheets for the manufacture of disposable baby napkins (diapers) or sanitary towels; fabrics for the manufacture of protective clothing or garment linings; *sheets for filtering liquids or air*, for use as stuffing materials, for sound insulation, for filtration or separation in road building or other civil engineering works; substrates for manufacturing bituminous roofing fabrics; primary or secondary backing for tufted carpets, etc.; handkerchiefs, bed linen, table linen, etc.

Explanatory Notes, Heading 5603 at 853 (emphasis in original and added).[90]

Moreover, the Explanatory Notes to heading 5603 expressly exclude from classification under that heading "(ij) Nonwovens for technical uses, of *heading 59.11*." *See* Explanatory Notes, Heading 5603 at 853. Heading 5911, in turn, covers "Textile products and articles, for technical uses, specified in note 7 to this chapter." Heading 5911, HTSUS. Because Sperifilt filter media is made of polyester fibers and is manufactured for use in industrial applications, it is – in the words of heading 5911 – a "[t]extile product[ ] . . . [or] article[ ]

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[3] Except as otherwise noted, all citations herein are to the 1996 version of the Explanatory Notes. Although the Explanatory Notes "do not constitute controlling legislative history," they nevertheless are "intended to clarify the scope of HTSUS subheadings and offer guidance in interpreting its subheadings," and are "generally indicative of the proper interpretation of the [HTSUS]. " *Mita Copystar Am., Inc. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citation omitted); *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (*quoting* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted* in 1988 U.S.C.C.A.N. 1547, 1582).

for technical use[ ]." *See* Heading 5911, HTSUS. Sperifilt filter media thus falls within the terms of heading 5911 if it is among those products and articles "specified in note 7 to . . . chapter [59]." *See id*.

Note 7 to Chapter 59 states, in relevant part:

> Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:
>
> (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of heading 5908 to 5910), the following only:
>
> * * *
>
> (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair[.]

Chapter 59, Note 7, HTSUS.

The Explanatory Notes to heading 5911 further specify that "[a]ll textile articles of a kind used for technical purposes (*other than* those of *headings 59.08 to 59.10*) are classified in this heading and *not* elsewhere in Section XI (see Note 7(b) to the Chapter)." Explanatory Notes, Heading 5911 at 902. *See also* Explanatory Notes, Heading 5603 at 853 (noting that "heading [5603] also excludes: . . . (ij) Nonwovens for technical uses, of heading 59.11").

In sum and substance, then, if the Sperifilt filter media is a nonwoven of a kind used for technical purposes (as the parties agree it is),[91] and if it falls within the meaning and scope of the term "straining cloth" as that term is used in Chapter 59 Note 7(a)(iii), it cannot be classified under heading 5603 and must be classified under heading 5911.

The heart of the parties' dispute thus lies in whether the Sperifilt filter media falls within the scope of "straining cloth" as the term is used in Chapter 59 Note 7(a)(iii) (as well as subheading 5911.40.00).

B.

The tariff term "straining cloth" is not statutorily defined, except to the extent that it is identified as falling within the scope of "textile products" classifiable under heading 5911. Where a tariff term is not statutorily defined, the term is presumed to be used in its normal sense, and is to be construed "according to [its] common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citation

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[4] *See, e.g.*, Pl.'s Brief at 25 ("Sperifilt filter media satisfies the first prerequisite of heading 5911 because it is used for technical purposes.").

omitted); *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003) (citation omitted); *see also Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988) ("the meaning of a tariff term is presumed to be the same as its common or dictionary meaning").

The meaning and scope of the tariff term "straining cloth" was at issue in *GKD*, which involved the classification of woven polyester filter belting used in waste water treatment equipment for the dewatering of industrial and municipal sludge. *See GKD-USA, Inc. v. United States*, 20 CIT 749, 751–52, 931 F. Supp. 875, 877–78 (1996). The importer claimed that the merchandise was properly classifiable under subheading 5911.90.00, but Customs classified it under subheading 5911.40.00.

Customs' classification was sustained. In reaching its conclusion, the *GKD* court construed the *eo nomine* term "straining cloth."[92] The sole restriction that Chapter 59 Note 7(a)(iii) places upon the "straining cloth" covered by heading 5911 is that it must be "of a kind used in oil presses or the like[.]"[93] Because it found no clearly stated legislative intent as to the meaning of "straining cloth," the *GKD* court construed the term in accordance with its common meaning. *GKD*, 20 CIT at 754–55, 931 F. Supp. at 879–80. Based on its review of various dictionaries and other references, the *GKD* court determined that "straining cloth" is generally referred to as "filter cloth," and is a "type of filter medium required for the process of filtration." *GKD*, 20 CIT at 755, 931 F. Supp. at 880. The court concluded:

> [T]he term "straining cloth" is intended to have a broad meaning. Used alone, the term "straining cloth" can apply to any fabric used as a medium of filtration.

GKD, 20 CIT at 755, 931 F. Supp. at 880; *see also FilmTec Corp. v. United States*, 27 CIT 1730, 293 F. Supp. 2d 1364 (2003).

Although the term "straining cloth" is broad, the term as it is used in Chapter 59 Note 7(a)(iii) is not, because it is an *eo nomine* provision governed by use. Where the language "of a kind" precedes "used for" in a tariff provision, it buttresses the interpretive rule governing use provisions which specifies that it is the use of the *class or kind* of

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[5] An *eo nomine* tariff provision is one which names a specific product or describes a commodity by a specific name. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998) (citation omitted). Absent an indication of legislative intent to the contrary, an *eo nomine* provision includes all forms of the article. *See Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840 (1989).

[6] Where – as here — an otherwise *eo nomine* designation ("straining cloth") is limited ("of a kind used in oil presses or the like"), it does not include all forms of the article, but, rather, only those embraced by the language of the provision. *See, e.g., United States v. Charles R. Allen, Inc.*, 184 F.2d 846, 853-55 (1950); *Nomura (Am.) Corp. v. United States*, 62 Cust. Ct. 524, 529 (1969), *aff'd*, 435 F.2d 1319 (1971).

goods that is controlling, rather than the use to which the specific imported goods were put. *See Group Italglass U.S.A., Inc. v. United States*, 17 CIT 226, 228 (1993); *see also Group Italglass U.S.A., Inc. v. United States*, 17 CIT 1177, 839 F. Supp. 866 (1993).

Because Chapter 59 Note 7(a)(iii) uses the language "of a kind used in," it is a principal use provision, governed by ARI 1(a) of the HTSUS. ARI 1(a) provides that, in the absence of special language or context which requires otherwise, "a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation of the goods of that class or kind to which the imported goods belong, and the controlling use is the principal use." The classification of merchandise pursuant to ARI 1(a) is thus controlled by the use of the "class or kind" of merchandise to which the goods belong, and not by the "actual" use of the specific imported merchandise. *See Clarendon Mktg.*, 144 F.3d at 1467.

Construing the scope of the term "straining cloth" in accordance with ARI 1(a), the *GKD* court next turned to the meaning of "oil press." *GKD*, 20 CIT at 756, 931 F. Supp. at 880–81. The court concluded that an oil press is "a machine that provides a mechanism to hold the filter medium and provides the force necessary to cause the fluid to flow. An oil press uses pressure to force the fluid to pass through the filter medium. In general terms, an oil press is a form of 'filter press.' " *Id*., 20 CIT at 756, 931 F. Supp. at 880. The *GKD* court thus ascertained the class or kind of goods to which an oil press belongs.

> Turning to the classification of the specific merchandise at issue in the case, *GKD* stated:
>
> [T]he Court interprets "oil presses or the like" to include the various presses described above which are all used to remove liquid and retain solids by creating a pressure differential. Thus, in order for the merchandise at issue to be properly classifiable under subheading 5911.40.00, HTSUS, it must be a filter cloth used on a press designed to separate liquids from solids through a change in pressure.

GKD, 20 CIT at 756, 931 F. Supp. at 881. The *GKD* court found that, although there were differences between the plaintiff's belt filter press and an oil press, both operate by means of a pressure differential. The court therefore sustained Customs' classification of the belt filter press under subheading 5911.40.00 of the HTSUS. *See GKD*, 20 CIT at 758, 931 F. Supp. at 881–83.

Airflow seizes on the second sentence in the excerpt from *GKD* quoted above, and builds its case against classification under subheading 5911.40.00 largely on that language: "[I]n order for the merchandise at issue to be properly classifiable under subheading 5911.40.00, HTSUS, it must be a filter cloth *used on a press* designed

to *separate liquids from solids* through a *change in pressure*." *GKD*, 20 CIT at 756, 931 F. Supp. at 881 (emphases added); Pl.'s Brief at 10.

Airflow's principal argument is that *GKD* holds that, to be classifiable under subheading 5911.40.00, merchandise must be used to separate liquids from solids, and Sperifilt filter media can only be used to separate solids from gases. *See generally* Pl.'s Brief at 10, 15, 17, 23–24; Pl.'s Reply Brief at 4, 8–10. However, there is nothing in the language of the statute to preclude classification under subheading 5911.40.00 of media that filters dust and other solid particles from the air.

Clearly, the phrase "or the like" expands the scope of subheading 5911.40.00 beyond just that "straining cloth" which is used in "oil presses." The phrase "or the like" is a reference to filtering devices that are *not* "oil presses." As the Government observes, "while an oil press may, or may not, be a filter press,[94] it does not follow that the articles encompassed by the phrase 'or the like' also fall within a category of filter presses." *Id*. (footnote added). There are two possible interpretations of the phrase.

Airflow would read the phrase "oil presses or the like" as a reference to "oil presses and other filter presses" (*i.e.*, other presses used to separate liquids, or fluids, from solids). However, the phrase is properly read as a reference to "oil presses and other filtering mechanisms." *See generally* Def.'s Reply Brief at 12. Indeed, in *GKD*, the court interpreted "oil presses or the like" to "*include* the various presses [that the court had] described above which are all used to remove liquid and retain solids." *GKD*, 20 CIT at 756, 931 F. Supp. at 881 (emphasis added).[95]

According to the Government, the *GKD* court's use of the word "include" "necessarily implies that it interpreted the category of straining cloths encompassed by Chapter 59 Note 7(a)(iii) and subheading 5911.40.00 to be greater than simply those used in connection with liquid filtering devices." *See* Def.'s Reply Brief at 12–13. The Government maintains, in essence, that the word "include"cannot fairly be read to *limit* "straining cloth" to only that "used to remove liquid and retain solids." To the contrary, the Government asserts, "include" is used expansively, to expressly embrace straining cloth beyond that "used to remove liquid and retain solids." *Id*.

While the Government points to the sentence in *GKD* in which the court "interprets 'oil presses or the like' to *include* the various

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[7] *GKD* noted: "*In general terms*, an oil press is a form of 'filter press.'" *GKD*, 20 CIT at 756, 931 F. Supp. at 880 (emphasis added).

[8] The presses that the *GKD* court had "described above" were both "plate" and "screw" presses (used to press oil), as well as "roll presses used for sugarcane and wood products and low–pressure screw presses used for beverage products and wood." *GKD*, 20 CIT at 756, 931 F. Supp. at 881.

presses described above" (*GKD*, 20 CIT at 756, 931 F. Supp. at 881 (emphasis added)), Airflow stakes its case on the next sentence of the opinion. There, the *GKD* court summed up, stating that – to be classifiable under subheading 5911.40.00 – merchandise must be used "to separate liquids from solids." *See GKD*, 20 CIT at 756, 931 F. Supp. at 881.

But Airflow tries to make far too much of a single sentence from *GKD*[96]. The parties' dispute in *GKD* did not turn on whether the solids there were being filtered from liquid or from air. And, of course, the *GKD* decision was limited to the merchandise at issue in that case – filtration equipment that was used to separate solids from liquids. The *GKD* court thus was not required to determine whether filters that separate solids from gases are within the scope of subheading 5911.40.00.court.[97] The issue presented in this action simply was not within the contemplation of the *GKD* court.[98]

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[9] Airflow implicitly attaches great weight to the use of the word "must" in the sentence from *GDK* on which it relies. But there is no indication that the *GDK* court intended the language of that sentence to be parsed so closely. Indeed, it appears that the sentence might just as easily have read: "Thus, the merchandise at issue is properly classifiable under subheading 5911.40.00, HTSUS, if it is a filter cloth used on a press designed to separate liquids from solids through a change in pressure." – language that would be entirely consistent with the court's analysis and with the result in *GKD*.

[10] Relying on the same single sentence of the opinion, Airflow similarly argues that *GKD* precludes classification of Sperifilt filter media under subheading 5911.40.00, because the filter media is not "used on a press" and assertedly does not operate "through a change in pressure." *See* Pl.'s Brief at 10, 23–25; Pl.'s Reply Brief at 4. But those arguments too must fail.

The Government focuses on the first sentence of the quoted excerpt, and again emphasizes the narrow issue before the *GKD* court. As the Government notes, *GKD* – read in context – interpreted the phrase "oil presses and the like" to *include* the various presses described in the sources that it consulted, but did not intend to *limit* the tariff provision to presses. *See generally* Def.'s Brief at 18–20. The court's determination in that case was, of course, confined to the merchandise there at issue, which all parties conceded to be a press – a belt filter press, to be exact. Thus, notwithstanding the sentence from the opinion on which Airflow pins its hopes, *GKD* did not hold that non-press filters were outside the scope of subheading 5911.40.00. That issue simply was not before the court.

Moreover, as the Government notes, even the excerpt from *GKD* on which Airflow relies refers to "presses" in terms of their use to "creat[e] a pressure differential." *See* Def.'s Brief at 20. And, contrary to Airflow's claims, the merchandise at issue here does require a pressure differential to operate. *See* Wittert Aff. ¶ 15 (explaining operation of filter in conjunction with use of fans to establish air pressure differential between environment inside paint spray booth and outside atmosphere).

[11] Invoking the principle of *ejusdem generis*, Airflow claims that Sperifilt filter media "cannot be considered of the same class or kind as oil press filters," because it does not filter liquids, is not used on any kind of press, and is not the kind of filter used on a press. Pl.'s Brief at 23–25; *see generally* Pl.'s Reply Brief at 6–8. However, Airflow's reliance on *ejusdem generis* is misplaced.

The principle of *ejusdem generis* provides that, "where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994). But the tariff language here at issue – "straining cloths of a kind used in oil presses or the like" – does not include "an enumeration of specific things followed by a

A broad construction of the phrase "straining cloths of a kind used in oil presses or the like" is supported by the Explanatory Notes to heading 5911, which weigh heavily against Airflow's claim. The Explanatory Notes expressly state that the heading encompasses filter media used in "technical applications in industrial dust collecting systems":

> Straining cloth (*e.g.*, woven filter fabrics an[d] needled filter fabrics), whether or not impregnated, *of a kind used in oil presses or for similar filtering purposes* (*e.g.*, in sugar refineries or breweries) *and for gas cleaning or similar technical applications in industrial dust collecting systems*. The heading includes oil filtering cloth, certain thick heavy fabrics of wool or of other animal hair, and certain unbleached fabrics of synthetic fibres (*e.g.*, nylon) thinner than the foregoing but of a close weave and having a characteristic rigidity. It also includes straining cloth of human hair.

Explanatory Notes, Heading 5911 at 902 (emphasis added).[99]

"[D]ust collection" involves "[t]he physical separation and removal of solid or liquid particles from a gas in which they are suspended." *See* McGraw-Hill Concise Encyclopedia of Science and Technology (3d ed., CD-Rom, 1994) (defining "dust and mist collection"). Sperifilt filter media is thus used for "dust collection" in industrial paint spray booths. As quoted above, the Explanatory Notes specifically

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general word or phrase." Accordingly, the principle of *ejusdem generis* is not implicated. *See generally* Def.'s Brief at 25.

And the Government points out a second flaw in Airflow's argument. Airflow quotes *Neco* to explain the basic principle of *ejusdem generis*. *See* Pl.'s Brief at 25 (*quoting Neco Elec. Prods. v. United States*, 14 CIT 181, 190 (1990)). But Airflow omits the language that follows the text that it quotes:

> *Ejusdem generis* is 'a specific application or illustration of the broader maxim *noscitur a sociis*, *i.e.*, known by its associates.' . . . *It is well established, however, that ejusdem generis is not to be invoked to restrict or limit the clear language of a tariff provision. . . . As with all principles or canons of statutory interpretation, ejusdem generis is 'used only as an instrumentality for determining the legislative intent in cases where it is in doubt.*' . . .

Def.'s Brief at 26 (*quoting Neco*, 14 CIT at 190 (emphasis added by Defendant) (citations omitted)). As the Government notes, Airflow seeks to invoke *ejusdem generis* to restrict or limit the language of Chapter 59 Note 7(a)(iii) and subheading 5911.40.00, even though Airflow has not established an ambiguity in the terms of those provisions. *See generally* Def.'s Brief at 25–26; Def.'s Reply Brief at 14–15. In short, resort to the principle of *ejusdem generis* is unnecessary and inappropriate here.

[12] The Government emphasizes that the quoted text of the Explanatory Note is the same text as that in 1986 version of the Explanatory Notes that was in place and thus available to Congress when it adopted the HTSUS in 1989. Accordingly, the Government notes, to the extent that legislative intent can be inferred from the Explanatory Notes then in place, it would seem that Congress intended heading 5911 to be interpreted in a manner consistent with those Explanatory Notes, which specifically refer to "straining cloth" as including filter fabrics (whether woven or unwoven) that are used for purposes other than filtering liquids. *See* Def.'s Reply Brief at 13–14; *see also* Pl.'s Brief at 10–11(noting that "the [1986] Explanatory Notes . . . were available to Congress when it adopted the HTSUS in 1989").

state that the filtration media embraced by heading 5911 includes media "for gas cleaning or similar technical applications *in industrial dust collecting systems*." Explanatory Notes, Heading 5911 at 902 (emphasis added). The relevant Explanatory Notes thus make it clear that Sperifilt filter media is covered by subheading 5911.40.00.

Airflow contends that the Government misinterprets the Explanatory Notes' reference to straining cloth used "for gas cleaning or similar technical applications in industrial dust collecting systems." Airflow highlights the word "and" that precedes the phrase "for gas cleaning . . . ," and argues that, in effect, the text requires that filters classified under 5911 "be usable to filter solids from liquids, *whether or not they are also usable for dust collection*." *See* Pl.'s Reply Brief at 13–14 (emphasis added); *id*. at ("If such cloth can *also* separate dust from air, it is included in subheading 5911.40.00, but it *must* respond to the basic description by being capable of separating solids from liquids."); *see also* Pl.'s Brief at 20–21. However, Airflow fails to explain how its reading does not render the reference to "gas cleaning or similar technical applications in industrial dust collecting systems" surplusage; and, moreover, it offers no support for its position other than *GKD*, which is explained above. *See GKD*, 20 CIT 749, 931 F. Supp. 875 (discussed *supra*).

Focusing on different language from the same Explanatory Note, Airflow claims that "[t]he Explanatory Notes clearly define 'straining cloth' . . . [as] woven fabric or 'needled' filter fabric, which is a type of felt." Pl.'s Reply Brief at 12; *see also* Pl.'s Brief at 20. Airflow contends that the quoted Explanatory Note "describe[s] *all* the fabrics that fall under Heading 5911." *See* Pl.'s Reply Brief at 12–13. Airflow further asserts that "[t]he plain language of the Explanatory Notes expressly requires that the fabrics of synthetic fibers classifiable in . . . heading [5911] must be *woven* and *thinner* than the fabrics usually made of *natural* fibers, including needled filter fabrics." Pl.'s Reply Brief at 13; *see also* Pl.'s Brief at 21. Because Sperifilt filter media is neither a woven fabric or a needled fabric, and because it is a synthetic of high loft, Airflow concludes that the terms of the Explanatory Note preclude classification under heading 5911. *See generally* Pl.'s Brief at 20–23; Pl.'s Reply Brief at 12–13.

However, Airflow's interpretation of the Explanatory Note ignores or misinterprets key text. In arguing that the Note "clearly define[s]" the term "straining cloth" as limited to "woven filter fabrics an[d] needled filter fabrics," Airflow conveniently ignores the introductory signal "*e.g.*". Similarly, Airflow's argument that the Note's list of fabrics is exhaustive depends on Airflow's claim that the phrase "[t]he heading includes" must be read as "[t]he heading is limited to" or "the heading covers only." *See* Pl.'s Brief at 22 (arguing that "[t]he list of exemplars . . . is all inclusive as expressed by the language 'the heading includes' rather than . . . 'the heading includes, for example'"); *see also* Pl.'s Reply Brief at 13. But Airflow offers no sup-

port for the proposition that "includes" should not be given its usual meaning. Airflow's reading of the Explanatory Note is thus, in a word, strained.[100]

C.

Customs' classification of Airflow's merchandise is reinforced by a classification opinion issued by the World Customs Organization ("WCO"),[101] construing the scope of heading 5911 in the context of classifying merchandise similar to the Sperifilt filter media at issue here. *See* Pl.'s Brief at 38 (noting that Filtrair filters at issue in WCO case are "similar to those at issue in this case").

The classification of the product at issue before the WCO was first placed on the agenda of the Harmonized System Committee ("HSC") by the European Community ("EC"). *See* Addendum B, Amendments to the Compendium of Classification Opinions Arising from the Classification of "Filtrair" Filters in Subheading 5911.40, Harmonized System Committee, 21st Session, 42.116E, Brussels, March 16, 1998. The EC had classified the product – a nonwoven mat used, *inter alia*, as a filter in paint spray booths – as a nonwoven, under heading 5603. The United States filed a reservation, claiming that the merchandise was properly classified under heading 5911, based upon Chapter 59 Note 7(a)(iii) and the Explanatory Notes to both headings 5603 and 5911. *Id.*; *see also* Addendum B, Annex F/6 to Doc. 41.600E (HSC/20/Nov.97).

The HSC's analysis included an inspection of the merchandise at issue, a review of the terms of the competing headings as well as the applicable Explanatory Notes, and consideration of the arguments proffered by delegates from various signatory countries. Following deliberation, the HSC agreed with the United States' position:

> [H]eading 59.11 takes precedence over heading 56.03 by virtue of Note 7 to Chapter 59, which states that goods of heading

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[13] (Pun intended.)

[14] Officially titled the Customs Cooperation Council, the World Customs Organization (as it is now known) was established by the United States and other state parties to the International Convention on the Harmonized Commodity Description and Coding System ("the Harmonized System"), to "resolve interpretative disputes that arise when many nations employ the same tariff schedule and to adapt the Schedule to the ever evolving array of products." *See Cummins Inc. v. United States*, 29 CIT____, ____, 377 F. Supp. 2d 1365, 1368 (2005), *aff'd*, 454 F.3d 1361 (*citing* U.S. Customs & Border Protection, What Every Member of the Trade Community Should Know About: Tariff Classification 9, 26–29 (2004)).

The WCO issues classification opinions, drafts and updates Explanatory Notes, and recommends amendments to the Harmonized System itself. *See Cummins*, 29 CIT at____, 377 F. Supp. 2d at 1368. The WCO body charged with interpreting and maintaining the Harmonized System, including the issuance of classification opinions, is the Harmonized System Committee ("HSC"). *Id*., 29 CIT at____, 377 F.2d at 1369 (noting role of HSC); *see also* What Every Member of the Trade Community Should Know About: Tariff Classification 24, 26–27.

> 59.11 "do not fall in any other heading of Section XI." The legal text is supported by the Explanatory Note to heading 56.03, exclusion (ij), which directs the classification of "nonwovens for technical uses" to heading 59.11. Accordingly classification in heading 56.03 is precluded if the filter material can be classified in heading 59.11.
>
> Heading 59.11 provides for "textile products and articles, for technical uses, specified in Note 7 to Chapter 59." Note 7(a)(iii) of Chapter 59 provides for straining cloth for technical uses. The material in question is for technical uses because it meets detailed performance specifications and is designed to be incorporated into ventilation apparatus for use in a variety of structures. Moreover, the product is specifically described as straining cloth "for gas cleaning or similar technical applications in industrial dust collecting systems." (*See* Explanatory Note to heading 59.11, Part (A), Item (3)). Consequently, the Committee concluded that the Filtrair material is classified in subheading 5911.40 provided that the provision applies to nonwovens.
>
> In this regard, the Committee took note that the text of heading 59.11 is not limited to woven fabrics. Moreover, the Explanatory Notes to the heading cite needled filter fabrics, a nonwoven material, as an example of straining cloth for technical uses. Although Note 1 to Chapter 59 defines the expression "textile fabrics" in a way that does not generally embrace nonwovens, the legal note does not apply under the English texts because heading 59.11 makes reference to "textile products and articles" and is in no way restricted to "textile fabrics." For this reason, the Committee determined that Note 1 to Chapter 59 has no bearing on the classification of the filter material under the English legal texts.

Addendum B, Agenda Item VII.10, Amendments to the Compendium of Classification Opinions Arising from the Classification of "Filtrair" Filters in Subheading 5911.40, Harmonized System Committee, 21st Session, dated March 2, 1998. The HSC concluded that no amendments of either the legal texts or the Explanatory Notes were necessary. *See* Addendum B, Annex F/6 to Doc. 41.600E (HSC/20/Nov.97) at ¶ 16.

Airflow tries to depict the WCO opinion as a "back-door approach" *see*king to undo *GKD*, and an "end run" around that decision. *See* Pl.'s Brief at 39; Pl.'s Reply Brief at 16. Airflow asserts that Customs "obviously does not like" *GKD*, and rhetorically queries why the case was not appealed. *See* Pl.'s Brief at 39; Pl.'s Reply Brief at 16. But, contrary to Airflow's implication, Customs *prevailed* in *GKD*; the court there sustained Customs' classification of the merchandise at issue. *See GKD*, 20 CIT at 758, 931 F. Supp. at 882 (concluding that

"Customs properly classified the [polyester filter belting at issue] under subheading 5911.40.00, HTSUS").

Airflow concedes, as it must, that "Customs has every right to consult with the WCO on tariff classification matters." Pl.'s Brief at 39. But, painting this case as one that implicates Constitutional separation of powers issues, Airflow argues that Customs was obligated to take the WCO opinion "and go to Congress with its position . . . and have Congress amend the statute." Pl.'s Brief at 38–39; *see also* Pl.'s Reply Brief at 16–17.

Contrary to Airflow's assertions, however, nothing in the WCO opinion necessitated an amendment to HTSUS. Indeed, as noted above, the HSC concluded that no amendments of either the legal texts or the Explanatory Notes were necessary.[102] The WCO opinion did not *change* any of the tariff provisions; it merely *interpreted* them. And Congress has previously indicated its intent, "in large measure, to harmonize United States tariff classifications with the recommendations of the WCO." *See Cummins*, 29 CIT at___, 377 F. Supp. 2d at 1368.

To be sure, the decisions of the WCO are not controlling authority, and are not binding on the United States courts. Nevertheless, the thorough and well-reasoned opinion in question – which addressed the construction of the same tariff provisions and the classification of merchandise similar to that here – is persuasive authority, and is instructive in reaching the correct result in this case. *See generally Cummins Inc. v. United States*, 454 F.3d 1361, 1366 (Fed. Cir. 2006), *aff'g*, 377 F. Supp. 2d 1365.

In sum, because Airflow's imported merchandise falls within the scope of the term "straining cloth," as that term is used in Chapter 59 Note 7(a)(iii), it is classifiable under heading 5911, and thus cannot be classified under heading 5603. *See* Explanatory Notes, Heading 5603 at 853 (excluding from scope of that heading "(ij) Nonwovens for technical uses, of heading 59.11").

D.

Airflow argues in the alternative that – if the Sperifilt filter media is to be classified under heading 5911 – it should be classified under subheading 5911.90.00, a residual provision, rather than subheading 5911.40.00. *See generally* Pl.'s Brief at 1, 10–11, 40; Pl.'s Reply Brief at 19–20.

> Classification at the subheading level is governed by GRI 6, which states:

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[15] Airflow makes the cryptic claim that "the Government itself has found it necessary to change the Explanatory Notes to heading 5911." *See* Pl.'s Brief at 38. But that assertion is unexplained, and finds no support in the record.

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

GRI 6, HTSUS. Assuming *arguendo* that Airflow's merchandise is *prima facie* classifiable under subheading 5911.90.00 (in addition to subheading 5911.40.00), the merchandise is properly classified under subheading 5911.40.00, pursuant to GRI 3.

GRI 3(a) – known as the rule of relative specificity – provides, in relevant part: "The heading which provides the most specific description shall be preferred to headings providing a more general description." *See* GRI 3(a), HTSUS. Under the rule of relative specificity, the proper classification is "the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food Corp.*, 140 F.3d at 1441.

The Explanatory Note to GRI 3(a) advises that, although "[i]t is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another," in general:

> (a) *A description by name is more specific than a description by class* (e.g., shaver and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 85.08 as electro-mechanical tools for working in the hand or in heading 85.09 as electro-mechanical domestic appliances with self contained electric motor).
>
> (b) *If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.*

Explanatory Notes, GRIs at 4 (emphasis added).

In the case at bar, subheading 5911.40.00 more specifically describes the merchandise as "straining cloth" than does subheading 5911.90.00, which merely covers "other" articles not specifically identified in preceding subheadings of Heading 5911. The term "straining cloth" is more specific than "other." Customs therefore properly classified Sperifilt filter media in the more specific provision for "straining cloth."

E.

The Government contends that Customs' position in this matter is entitled to *Skidmore* deference. *See generally* Def.'s Brief at 6, 7–10;

Def.'s Reply Brief at 4–10. While Customs' classification rulings do not merit *Chevron* deference, they are entitled to "a respect proportional to [their] 'power to persuade.' " *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (*citing Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "That power to persuade depends on the thoroughness evident in the classification ruling, the validity of its reasoning, its consistency with earlier and later pronouncements, the formality attendant the particular ruling, and all those factors that give it power to persuade." *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (footnote omitted) (citations omitted).

In this case, Airflow filed an application for further review ("AFR") in conjunction with one of its protests. Because Airflow did not satisfy certain requirements for further review, Customs denied the AFR in Headquarters Ruling Letter ("HRL") 965220 (Sept. 27, 2001). HRL 965220 thus did not address the substantive merits of the classification issue that is presented here, and instead focused on Airflow's failure to meet the prerequisites for further review. *See* HRL 965220. However, HRL 965220 did identify several other ruling letters which, according to the Government, "provide the basis for denying Airflow's protest" (*see* Def.'s Brief at 8) – including HRL 955244 (April 4, 1994), HRL 954138 (June 15, 1993), HRL 958248 (June 4, 1996), and NYRL 817928 (Jan. 12, 1996). The Government also identifies and relies on "numerous other ruling letters addressing the classification of filtering cloths and the scope of Headings 5911 and 5603," including HRL 958415 (March 26, 1996), HRL 950167 (March 13, 1992), and HRL 965659 (Aug. 27, 2002). *See* Def.'s Brief at 8.

Notwithstanding the absence of a ruling letter directly addressing the classification of the specific merchandise at issue here,[103] the Government asserts that there are "several compelling reasons" for according *Skidmore* deference to Customs' position. Def.'s Brief at 8–9. In particular, the Government asserts that the rulings demonstrate that Customs "has had a longstanding and consistent position regarding the meaning and scope of the term 'straining cloths' under Heading 5911." *Id*. at 9; Def.'s Reply Brief at 9. The Government also emphasizes that "Customs has consistently classified various types of filter materials, similar to the merchandise at issue here, as 'straining cloths' under Heading 5911, subheading 5911.40.00." Def.'s Brief at 9; Def.'s Reply Brief at 7. The Government further states that "Customs' position here is based upon, consistent with, and sup-

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[16] *See* Park B. Smith Ltd. v. United States, 347 F.3d 922, 925 (Fed. Cir. 2003) (notwithstanding absence of formal Customs opinion classifying merchandise at issue, "*Skidmore* weight should be given to Customs' position"); *cf. Michael Simon Design, Inc. v. United States*, 30 CIT____, ____, 452 F. Supp. 2d 1316, 1321 (2006) (acknowledging *Park B. Smith* ruling on *Skidmore* deference).

ported by the agency's position as set forth in HRL 955244, HRL 954138, HRL 958248, HRL 950493, NY 865310, NY 817928, HRL 958415, HRL 950167, and HRL 965659." Def.'s Brief at 9.

In addition, the Government argues that the ruling letters supporting Customs' classification decision in this case "contain a thorough and carefully reasoned analysis of the proper classification of filter media." *Id*. at 9–10; *see also* Def.'s Reply Brief at 7, 9. The Government further asserts that "although no body of judicial decisions were initially available for Customs' consideration, [its] construction of the relevant tariff provision and [its] decision regarding filter media is consistent with [*GKD*]." Def.'s Brief at 10. And, finally, the Government emphasizes that "Customs' decision regarding the classification of the imported Sperifilt filter media and other nonwoven filter media used for industrial purposes is consistent with [the] WCO Classification Opinion addressing the classification of substantially similar merchandise." *Id*.

Airflow maintains that Customs' position is entitled to no deference. *See generally* Pl.'s Skidmore deference). Reply Brief at 17–19. In particular, Airflow contends that Customs' position as set forth in its ruling letters "lack meaningful explanation and are totally inconsistent with the decision in [*GKD*]." *Id*. at 18. Airflow emphasizes that six of the seven rulings cited by the Government pre-date *GKD*. According to Airflow, those six rulings do not reflect "*any* analysis of the statutory language 'of a kind used in oil presses or the like, including that of human hair.' " *Id*. (*quoting* HTSUS subheading 5911.40.00). Airflow further argues that the one post-*GKD* ruling, HRL 965659, "simply ignored the Court's holding in [*GKD*]." *Id*. Airflow therefore concludes that Customs' positions "both prior and after the Court's decision in [*GKD*] "lack thoroughness, valid reasoning, and are not consistent with the holding" in that case, and thus warrant no deference whatsoever. *Id*. at 19.

As discussed above, even absent deference to Customs' position and prior rulings, the classification of Sperifilt filter media under subheading 5911.40.00 is sustained. There is therefore no need to determine whether Customs' position and prior rulings would otherwise merit *Skidmore* deference under the specific circumstances of this case.

IV. *Conclusion*

As set forth above, the Sperifilt filter media at issue was properly classified under HTSUS subheading 5911.40.00. Plaintiff's Motion for Summary Judgment is therefore denied, and Defendant's Cross-Motion is granted.

Judgment will enter accordingly.

AIRFLOW TECHNOLOGY, INC., *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 02–00099

[Plaintiff's motion for summary judgment is denied; Defendant's cross-motion is granted.]

JUDGMENT

This action having been duly submitted for decision; and the Court, after due deliberation, having rendered a decision herein;

NOW, therefore, in conformity with said decision, it is

ORDERED that Plaintiff's Motion for Summary Judgment be, and hereby is, denied; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment be, and hereby is, granted; and it is further

ORDERED that the classification of the subject merchandise under subheading 5911.40.00 of the Harmonized Tariff Schedule of the United States is hereby sustained; and it is further

ORDERED, ADJUDGED, and DECREED that this action be, and hereby is, dismissed.

Slip Op. 07–53

KYONG TRUONG, Plaintiff, v. UNITED STATES SEC'Y OF AGRICULTURE, Defendant.

Before: Pogue, Judge
Ct. No. 05–00419

[Remanded for consideration of Plaintiff's claim for equitable tolling; Defendant's motion to dismiss denied]

Dated: April 4, 2007

Williams Mullen (*Jimmie V. Reyna* and *Francisco J. Orellana*) for Plaintiff;[1]

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*, Trial Attorney) for Defendant United States Secretary of Agriculture.

[1] The court would like to express its appreciation to Williams Mullen for representing plaintiff *pro bono*.

MEMORANDUM OPINION

Pogue, Judge: The captioned matter is before the court following a prior remand of Plaintiff Kyong Truong's claim for equitable tolling. *See Truong v. United States Sec'y of Agric.*, 30 CIT ___ , Slip. Op. 06–150 (Oct. 12, 2006). On remand, the Secretary of Agriculture ("the Secretary" or "the government") denied Mrs. Truong's claim. In response, Plaintiff challenges the factual findings upon which the Secretary's redetermination is based. For the reasons set forth below, the court remands this matter for the government to consider any evidence necessary to make thorough, factual findings, including Mrs. Truong's affidavit in support of her claim for equitable tolling and the affidavit first introduced by the government in its briefing.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 19 U.S.C. § 2395(c).[2] Pursuant to this statutory provision, the court reviews the remand determination for compliance with the remand order. *Cf. NMB Sing. Ltd. v. United States*, 28 CIT ___ , 341 F. Supp. 2d 1327 (2004) (affirming International Trade Commission's determinations on remand where the determinations were in accordance with law, supported by substantial evidence, and otherwise satisfied the remand order); *see also Olympia Indus., Inc. v. United States*, 23 CIT. 80, 82, 36 F. Supp. 2d 414, 415 (1999) (affirming after "review[ing] Commerce's compliance with these instructions in its Remand Results" and finding the determination to be supported by substantial evidence and in accordance with law). The court will uphold the government's factual determinations if they are supported by substantial evidence. 19 U.S.C. § 2395(b). The court will uphold the Secretary's legal determinations if they are "in accordance with law." *Former Employees of Gateway Country Stores LLC v. Chao*, 30 CIT ___ , ___ , Slip Op. 06–32 at 9 (March 3, 2006), *Former Employees of Elec. Data Sys. Corp. v. United States Sec'y of Labor*, 28 CIT ___ ,___ , 350 F. Supp. 2d 1282, 1286 (2004), *Former Employees of Rohm & Haas Co. v. Chao*, 27 CIT 116, 122, 246 F. Supp. 2d 1339, 1346 (2003).

BACKGROUND[3]

On November 30, 2004, the Secretary recertified Texas shrimpers for trade adjustment assistance ("TAA") under the Trade Adjustment

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[2] All references to 19 U.S.C. §§ 2395, 2401 *et seq.* are to Supplement IV of the 2000 edition of the United States Code (2004). Otherwise, references to the United States Code are to the 2000 edition.

[3] The facts of this case are more fully detailed in the court's earlier decision. *Truong*, 30 CIT ____ , Slip. Op. 06–150. Here, the court recounts only those facts relevant to its review of the remand determination.

Assistance Reform Act of 2002, Pub. L. 107–210, Title 1, Subtitle C, § 141, 116 Stat. 933, 946 (2002), 19 U.S.C. § 2401(e) (West Supp. 2005). *See Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 69,582, 69,582 (United States Dep't Agric. Nov. 30, 2004) (notice). From the date of this notice, the Trade Act of 2002 required eligible shrimpers to file an application by February 28, 2005 in order to qualify for benefits. *See id. See generally* 19 U.S.C. § 2401e(a)(1); 7 C.F.R. §§ 1580.102, 1580.301(b). Mrs. Truong filed her application for benefits on March 21, 2005 – some 21 days after the deadline. Citing the untimeliness of her application, the United States Department of Agriculture's Farm Service Agency ("FSA") denied Mrs. Truong's application on May 3, 2005.

Subsequently, Mrs. Truong brought suit before the court, claiming that the FSA did not properly provide her with notice of the recertification of benefits, as required by 19 U.S.C. § 2401d,[4] and contending therefore that the filing deadline should be equitably tolled. Although Mrs. Truong did not initially raise an adequacy of notice defense before the agency, Mrs. Truong attached an affidavit to her Cross-Motion for Summary Judgment in which she attests that she had no notice of the filing deadline, due in part to being out at sea regularly between November, 2004 and March, 2005. Aff. Kyong Truong (Mar. 27, 2006). Because the Secretary had not considered Mrs. Truong's claim for equitable tolling, the court remanded the matter, instructing the government to make findings of fact as to (a) whether the FSA complied with its statutory duty to notify Mrs. Truong of the recertification, (b) whether Mrs. Truong had actual notice of the recertification, and (c) whether Mrs. Truong had shown due diligence after receiving actual notice. *Truong*, 30 CIT ___ , Slip. Op. 06–150 at 13–14.

On remand, the Secretary considered additional evidence, *see* Second Supp. List Docs. Constituting Admin. R. ("Second Supp. Admin. R.), but did not enter into the administrative record Mrs. Truong's affidavit. *Id*. The Secretary's remand determination found that FSA gave notice to Mrs. Truong of her eligibility for benefits and the deadline for applying therefor, that Mrs. Truong had actual notice of the deadline, and that Mrs. Truong has not shown that she exercised due diligence and is therefore ineligible for TAA cash benefits.

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[4] That provision provides in relevant part:

> Notice of benefits
>
> (1) In general
>
> The Secretary shall mail written notice of the benefits available under this part to each agricultural commodity producer that the Secretary has reason to believe is covered by a certification made under this part.

19 U.S.C. § 2401d(b)(1).

DISCUSSION

A. The Secretary's Finding that the FSA Notified Mrs. Truong of the Deadline is not Supported by Substantial Evidence on the Record

In its remand determination, the Secretary found that the FSA had satisfied its statutory duty under 19 U.S.C. § 2401d to notify Mrs. Truong of her eligibility for trade adjustment assistance and the deadline for applying for these benefits. The evidence the Secretary relied upon in so finding has now been placed in the administrative record, which, despite Mrs. Truong's objections, the government properly reopened in order to make its factual determinations. *See, e.g., Anderson v. United States Sec'y of Agriculture*, 30 CIT ___ , ___ (2006), 429 F. Supp. 2d 1352, 1356 (remanding for agency to "re-open the record and obtain all evidence reasonably necessary to ensure that its administrative record is complete").

The government's new evidence contains, *inter alia*, a list of 2,370 addresses, including that of Mrs. Truong. Second Supp. Admin. R. Doc. 8. Also included were invoices for the processing of and postage for the Brazoria-Galveston Newsletter for the months of December, January, and February, showing that approximately 1,750 newsletters were sent out for each of those months.[5] Second Supp. Admin. R. Docs. 2–7. Because Mrs. Truong's address was on the list of 2,370 addresses, the Secretary concluded that the FSA had sent Mrs. Truong the Brazoria-Galveston Newsletter for those three months.[6] The record established, however, that approximately 600 fewer newsletters were posted and processed than there were addresses, *see* Court's Letter to Counsel (Dec. 8, 2006), and different numbers of newsletters were processed and posted in different months, *see* Court's Letter to Counsel (Jan. 26, 2007). Faced by the facts on record, the court requested further briefing on these issues.

In response to the court's request, the government filed supplemental briefing and attached an affidavit from the County Executive Director of the Brazoria County FSA office, Janet Sronce, see Aff. Janet Sronce, Attach. To Def.'s Resp. Ct.'s Q. ("Sronce Aff."). The affidavit explained that only one newsletter is sent to each household, though each individual producer's name is listed separately on the

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[5] Specifically, the number of newsletters for which processing/postage fees were incurred for the three months were 1,774/1,746 for December, and 1,781/1,751 for both January and February. Second Supp. Admin. R. Docs. 2–7. There is no explanation in the record for the difference between the number of newsletters processed and the number posted in each month.

[6] The Brazoria–Galveston County Newsletters for the months of December 2004, January and February 2005 are included in the Supplement to the Administrative Record at pages 8–10. The newsletters, put out by the FSA, include notification of the Secretary's certification of shrimpers and the deadline for filing an application for benefits. Supp. Admin. R. at 8–10.

address list, thus offering a plausible explanation for the discrepancies between the address list and the processing and postage numbers.[7] However, Ms. Sronce also explained that the address list containing Mrs. Truong's address was not necessarily identical to the list(s) used from December, 2004 through February, 2005, "because this list is updated on a regular basis." Sronce Aff. at ¶5. The government's briefing confirms that "[t]he record contains the most updated address list at the time of filing the record." Def.'s Resp. Ct.'s Supp. Q. 2. There is therefore a gap in the record chain of causality upon which the government bases its remand determination concerning notice to Mrs. Truong. Specifically, there is no evidence that Mrs. Truong's address was used to mail the newsletters during the relevant time frame. The remand results, however, contain no discussion of this gap in the record. Rather, the record leaves open the possibility that Mrs. Truong's name was not on the list during the relevant months, and was only added later. Nevertheless, the Secretary found that "Mrs. Truong's name and address appear on *the* mailing list for *the* newsletter" and "[t]he invoices for processing and postage for the December newsletter are dated December 20, 2004." Remand Det. at 1 (emphasis added).[8] Thus, the government implied that the address list in the record corresponds to the processing and postage invoice for December, 2004, (and the following months) without acknowledging or weighing other possibilities. Indeed, the Sronce Affidavit, which only explains, but does not cure, the discrepancy, was prepared for this litigation, not during agency fact-finding on remand. Therefore, the agency's determination as stated on remand is not supported by substantial evidence in the record.

In addition, the agency's methodology during remand does not meet the "threshold requirement of reasonable inquiry" for TAA claims, without which the government's determinations "cannot constitute substantial evidence upon which a determination can be affirmed." *Former Employees of Hawkins Oil & Gas, Inc. v. United States Sec'y of Labor*, 17 CIT 126, 130, 814 F.Supp. 1111, 1115 (1993) (ordering the Secretary of Labor to certify a group of workers when despite multiple remands, the agency "repeatedly ignored the Court's instructions to conduct a more thorough investigation"); *Former Employees of Sun Apparel v. United States Sec'y of Labor*, 28 CIT ___, ___, Slip. Op. 04–106 at 15 (Aug. 20, 2004); *Anderson v.*

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[7] The court notes, however, that the affidavit does not indicate how newsletters are addressed for a household with multiple producers in residence. Thus, the government's statement of its practice may also provide evidence that notice is not given to each producer.

[8] The Remand Determination contains a similar assertion for January, 2005, that "[t]he invoices for processing and postage for the January newsletter are dated January 24, 2005," Remand Det. at 2, and for February, 2005, that "[t]he invoices for processing and postage for the February newsletter are dated February 18, 2005." *Id.*

United States Sec'y of Agriculture, 30 CIT at ___ , 429 F. Supp. 2d at 1353.

In fact, the government chose to ignore conflicting evidence: namely, the Truong affidavit, which the government declined to enter into the record. In the affidavit, Mrs. Truong states that "[d]uring the period [between November, 2004 and March, 2005], I was not contacted or informed, by the [United States Department of Agriculture] or its agents, or otherwise made aware that the [United States Department of Agriculture] had recertified Texas shrimpers for Trade Adjustment Assistance for the marketing year 2003." Truong Aff. at ¶6. Further investigation was warranted. *See Anderson*, 429 F. Supp. 2d at 1355–56 (discussing agency's duty to investigate contradictory and inconsistent information); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (evidence supporting an agency's position must be "viewed in the light that the record in its entirety furnishes," including contradictory evidence).

The government further argues that notwithstanding the uncertain reliability of the address list, "it is reasonable to conclude that actual notice was mailed based upon the allowable assumption that the County Executive Director properly performed her duty of providing notice." Def.'s Resp. Ct.'s Supp. Q. 2 (citation omitted). However, nothing on the record shows that the Secretary's determination that Mrs. Truong was mailed notice was based on an assumption that the Executive Director properly performed her duty of providing notice. Rather, this argument is a post-hoc rationalization for Agency action, and as such, cannot stand. *See Anderson v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1333, 1341 (2006) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Furthermore, to reason that agency officials are presumed to perform their duties and that therefore Mrs. Truong was properly notified is mere ipsedixitism, not the factual findings that this court directed the government to make. *See Truong*, 30 CIT ___ , Slip. Op. 06–150.

B. The Secretary's Determination that Mrs. Truong had Actual Notice of Benefits is not Supported by Substantial Evidence

The Secretary also determined on remand that Mrs. Truong had actual notice of the TAA program based on the fact that she had "prepared multiple applications during the few lulls that fishermen have while they are out to sea." Remand Det. at 3, quoting P.'s Opp. Mem. 3. Here again, the government chose not to acknowledge or weigh conflicting information. The government focused on arguments Plaintiff made before the court, but did not consider the Truong Affidavit, which explains that between November, 2004 and March, 2005, "I had in my possession multiple copies of the application for Trade Adjustment Assistance, which I completed at that time in anticipation of filing them upon returning permanently to land

and finding out the period for filing those applications with the [United States Department of Agriculture]". Truong Aff. ¶7. One possible interpretation of these statements is that Mrs. Truong did not have notice, but was diligently preparing her application in anticipation of receiving it. Because the government did not enter Mrs. Truong's affidavit in the record, it made no determination of the weight to give to this evidence.

Although agencies have "considerable discretion" in investigations of TAA claims, they still must meet the threshold of reasonable inquiry discussed in section A, *supra*, *Former Employees of Hawkins Oil & Gas, Inc.*, 814 F.Supp. at 1115, and the Secretary must consider contradictory evidence, *see Former Employees of Barry Callebaut v. Herman*, 25 CIT 1226, 1235, 177 F. Supp. 2d 1304, 1313 (2001) (ordering Labor to verify employer's sworn statements in the face of contradictory evidence) (rev'd on other grounds at *Former Employees of Barry Callebaut v. Herman*, 357 F.3d 1377 (Fed. Cir. 2004)); *see also Former Employees of Kleinerts, Inc. v. Herman*, 23 CIT 647, 654, 74 F. Supp. 2d 1280, 1288 (1999) (finding it inappropriate to rely on unverified statements from company officials when factual discrepancies exist in record); *see also Universal Camera Corp.*, 340 U.S. at 488 (entirety of evidence must be reviewed). Here, the government did not meet the required threshold when it refused to consider Mrs. Truong's contradictory evidence.

C. The Secretary's Determination that Mrs. Truong failed to show Due Diligence in Pursuing her Benefits is not Supported by Substantial Evidence

When originally remanding this matter to the agency, this court stated that "[i]f the FSA has failed to properly discharge its statutory duty, then it is certainly understandable why a person would remain justifiably ignorant of his or her claim." *Truong*, 30 CIT at ___ , Slip. Op. 06–150, 12–13. The court has already found that the Secretary's determinations as to whether the government discharged its statutory duty to notify Mrs. Truong of her benefits is not supported by substantial evidence. Therefore, the government's rejection of Mrs. Truong's due diligence claim must also fail. The court once again notes that Mrs. Truong's affidavit gives some evidence of diligence in pursuing her benefits. Truong Aff. ¶7. On remand, it is appropriate for the Secretary to weigh that evidence when making factual findings.

CONCLUSION

For the foregoing reasons, the court remands this matter for further consideration consistent with this opinion. The government shall have until May 4, 2007, to provide a remand determination.

Plaintiff shall submit comments on the government's remand determination no later than May 25, 2007, and the government shall submit rebuttal comments no later than June 11, 2007. The government's motion to dismiss is denied. SO ORDERED.