U.S. Customs and Border Protection

Slip Op. 09–91

NSK CORPORATION, et al., Plaintiffs, and FAG ITALIA SPA, et al., Plaintiff-Intervenors, v. UNITED STATES, DEFENDANT, AND THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00334

[Defendant's Remand Determination is not supported by substantial evidence or in accordance with law and is, therefore, remanded.]

Dated: August 31, 2009

Crowell & Moring LLP (*Matthew P. Jaffe, Robert A. Lipstein*, and *Carrie F. Fletcher*), for Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd.

Sidley Austin LLP (*Neil R. Ellis* and *Jill Caiazzo*), for Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Max F. Schutzman* and *Andrew T. Schutz*), for Plaintiff-Intervenors FAG Italia SpA, Schaeffler Group USA, Inc., Schaeffler KG, The Barden Corporation (U.K.) Ltd., and The Barden Corporation.

Steptoe & Johnson (*Herbert C. Shelley, Alice A. Kipel*, and *Susan R. Gihring*), for Plaintiff-Intervenors SKF Aeroengine Bearings UK and SKF USA, Inc.

United States International Trade Commission, *James M. Lyons* (General Counsel), *Neal J. Reynolds* (Assistant General Counsel for Litigation), *David A.J. Goldfine*, and *Mark B. Rees*, Office of the General Counsel, for Defendant United States.

Stewart and Stewart (*Terence P. Stewart, Eric P. Salonen*, and *Elizabeth A. Argenti*), for Defendant-Intervenor The Timken Company.

OPINION & ORDER

BARZILAY, JUDGE:

I.
INTRODUCTION

This case returns to the court following the U.S. International Trade Commission's ("ITC") remand determination on the second five-year, or "sunset," review of certain antidumping duty orders

covering ball bearings from Japan and the United Kingdom.[1] *Certain Ball Bearings and Parts Ther[e]of from Japan and the United Kingdom*, USITC Pub. 4082, Inv. Nos. 731–TA–394–A, 731–TA–399–A (May 2009), *available at* http://www.usitc.gov/publications/701_731/pub4082.pdf ("*Remand Determination*"). In *NSK Corp. v. United States*, 32 CIT ___, 577 F. Supp. 2d 1322 (2008) ("*NSK I*"), and as further clarified by *NSK Corp. v. United States*, 32 CIT ___, 593 F. Supp. 2d 1355 (2008) ("*NSK II*"), the court affirmed in part, and remanded in part, the ITC's second sunset review of the subject antidumping duty orders. The focus of the three issues remanded to the ITC centered on the presence and effect of significant numbers of non-subject imports in the domestic market and the effect of significant restructuring in the domestic ball bearing industry. Upon consideration of the court's remand instructions in the two cited cases, the ITC again determined that revocation of the antidumping duty orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.[2] *Remand Determination* at 1. Plaintiffs NSK Corporation, NSK Ltd., NSK Europe Ltd. (together, "NSK"),[3] along with JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT"),[4] challenge the ITC's remand determination, arguing that it is unsupported by substantial evidence and not in accordance with law. The court finds that the ITC's remand determination is neither supported by substantial evidence or in accordance with law for the reasons explained herein, and therefore remands the case to the agency for a second time to conduct further proceedings consistent with this opinion.

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[1] The ITC is an independent federal agency of Defendant United States that is responsible for making the determination that is the subject of this dispute.

[2] Defendant-Intervenor The Timken Company ("Timken"), who joins this proceeding as a matter of right under USCIT Rule 24, agrees with the ITC's final results described in the *Remand Determination*.

[3] NSK Corporation is a U.S. company that produces ball bearings domestically and imports these products from its sister companies – NSK Ltd., a Japanese corporation, and NSK Europe Ltd., a British corporation. NSK Ltd. is a party to the present action, while NSK Europe Ltd. is a party in Court No. 06–00336, which joins this case pursuant to USCIT R. 42(a).

[4] JTEKT Corporation is a Japanese manufacturer and exporter of ball bearings, and Koyo Corporation of U.S.A. is a domestic importer of such products. Both JTEKT Corporation and Koyo Corporation of U.S.A. are plaintiffs in Court No. 06–00335, a case that the court consolidated with the action here. USCIT R. 42(a).

II.
Background

A.
The Role of the U.S. International Trade Commission in a Sunset Review

Every five years following the initial publication of an antidumping duty order, the U.S. Department of Commerce ("Commerce") and the ITC must conduct a sunset review. 19 U.S.C. § 1675(c). More specifically, for an antidumping duty order to remain in effect, (1) Commerce must affirmatively determine that dumping of the subject merchandise "would be likely to continue or recur," and (2) the ITC must similarly find that the subject imports would be likely to continue or cause material injury to the domestic industry in the absence of the antidumping duty order. § 1675(d)(2). In other words, the central task of the ITC in a sunset review is to determine whether the subject merchandise would likely continue to materially injure or cause material injury to the domestic industry if Commerce revoked the antidumping duty order. § 1675(d)(2)(B). To make a proper injury determination, the ITC must "consider the likely volume, price effect, and impact of imports of the subject merchandise on the [domestic] industry if the order is revoked . . . ." 19 U.S.C. § 1675a(a)(1). The ITC must weigh numerous factors in making that determination, including

> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued . . . ,
>
> (B) whether any improvement in the state of the industry is related to the order . . . ,
>
> (C) whether the industry is vulnerable to material injury if the order is revoked . . . , and
>
> (D) in an antidumping proceeding under [§ 1675(c)] . . . , the findings of [Commerce] regarding duty absorption under [§ 1675(a)(4)] . . . .

§ 1675a(a)(1)(A)–(D). While the ITC must consider all of the factors enumerated in the statute, no one factor is necessarily dispositive:

> [t]he presence or absence of any factor which the [ITC] is required to consider under [§ 1675a(a)] shall not necessarily give decisive guidance with respect to the [ITC's] determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked . . . . In making that determination, the [ITC] shall consider that the

> effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.

§ 1675a(a)(5).

B.
The Original Antidumping Duty Order & Subsequent Reviews

In 1989, Commerce issued an antidumping duty order covering ball bearings from, among other nations, Japan and the United Kingdom. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed. Reg. 20,900, 20,900–911 (Dep't Commerce May 15, 1989). The ITC initiated the first set of sunset reviews pursuant to § 1675(c) in 1999, with the agency ultimately determining that the revocation of the antidumping duty orders would likely lead to continuation or recurrence of material injury to the U.S. ball bearing industry. *See Continuation of Antidumping Duty Orders: Certain Bearings From France, Germany, Italy, Japan, Singapore, the United Kingdom, and the People's Republic of China*, 65 Fed. Reg. 42,665, 42,665 (Dep't Commerce July 11, 2000). In June 2005, the ITC automatically initiated a second sunset review of the antidumping duty orders. *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 31,531, 31,532 (ITC June 1, 2005). Approximately one year later, the ITC made an affirmative determination that the revocation of the antidumping duty orders would likely lead to continuation or recurrence of material injury to the domestic industry. *Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 71 Fed. Reg. 51,850, 51,850 (ITC Aug. 31, 2006). Plaintiffs NSK and JTEKT thereafter filed suit to challenge the final results of the second sunset review.

C.
Procedural History

In *NSK I*, the court affirmed in part, and remanded in part, the ITC's second sunset determination. 32 CIT ___, 577 F. Supp. 2d 1322. Specifically, the court ordered the ITC to address three issues on remand. First, the court directed the ITC to reevaluate whether the revocation of the antidumping duty order would be likely to lead to continuation or recurrence of material injury to the domestic industry given the significant presence of non-subject imports in the domestic

market. *Id.*, 32 CIT at ___, 577 F. Supp. 2d at 1330–34. The core of that instruction directed the ITC to reconsider whether, in light of the significant presence of non-subject imports, the subject imports are more than a mere tangential factor in the material injury to the domestic industry that is likely to continue or recur in the absence of the antidumping duty order. *See id.* Second, the court instructed the ITC to reassess the supply conditions within the domestic market, with a particular eye towards reexamining the agency's vulnerability and impact findings given the significant restructuring within the global ball bearing industry. *Id.*, 32 CIT at ___, 577 F. Supp. 2d at 1338-39. Finally, the court directed the ITC to reconsider its discernible adverse impact analysis and decision to cumulate ball bearings from the United Kingdom with other subject imports because the agency's analysis on this issue was incomplete without a more scrupulous examination of the significant rise in non-subject imports and the large-scale restructuring within the ball bearing industry. *Id.*, 32 CIT at ___, 577 F. Supp. 2d at 1337–38.

In *NSK II*, Defendant and Defendant-Intervenor asked the court to reconsider its decision in *NSK I* in view of an alleged change in the controlling law – *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008) ("*Mittal*"). 32 CIT ___, 593 F. Supp. 2d 1355. In response, the court first explained in detail the statutory demands placed on the ITC in a sunset review by §§ 1675(c) and 1675a(a). *Id.*, 32 CIT at ___, 593 F. Supp. 2d at 1363–67. Sections 1675(c) and 1675a(a) focus on the issue of causation in a sunset review, and the court noted that the central task for the ITC is to discern "whether the subject imports themselves would be a substantial factor in the cause of injury to the domestic industry, rather than some secondary, 'merely incidental, tangential, or trivial factor.'" *Id.*, 32 CIT at ___, 593 F. Supp. 2d at 1364–65 (citation omitted). That obligation, however, does not mean that the ITC must "identify and analyze every factor that could potentially cause injury to the domestic industry [or] determine that the subject merchandise is the 'sole or principal cause of injury.'" *Id.*, 32 CIT at ___, 593 F. Supp. 2d at 1365 (citation omitted). In carefully expounding the agency's duty, the court plainly emphasized that

> the ITC is not required "to address the causation issue in any particular way, or to apply a presumption that non-subject producers would have replaced the subject imports if the subject imports had been removed from the market." *Mittal*, 542 F.3d at 878 (footnote omitted). Rather, the primary responsibility of the ITC is "to consider the causal relation between the subject imports and the injury to the domestic industry . . . ." *Id.* at 877 (explaining that [*Bratsk Aluminum Smelter v. United States*,

> 444 F.3d 1369 (Fed. Cir. 2006) ("*Bratsk*")] does not require the ITC to employ a presumption that non-subject goods would replace subject goods if the subject goods were removed from the market). The ITC is simply required "to give full consideration to the causation issue and to provide a meaningful explanation of its conclusions." *Id.* at 878 (citation omitted). The ITC fulfills its statutory duty by determining "whether the subject imports were a *substantial factor* in the injury to the domestic industry, as opposed to a merely incidental, tangential, or trivial factor." *Id.* at 879 (interpreting *Bratsk*, 444 F.3d at 1373) (citations & quotations omitted).

Id., 32 CIT at ___, 593 F. Supp. 2d at 1366. The court went on to state that the Federal Circuit's opinion in *Mittal* did not constitute an intervening change in the controlling law. *Id.*, 32 CIT at ___, 593 F. Supp. 2d at 1367–72. Importantly, the ITC's discussion of the court's holdings in *NSK II* in its remand analysis is noticeably scant.

III.
Subject Matter Jurisdiction & Standard of Review

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

An agency supports its determination and the findings therein with substantial evidence when the record contains "more than a mere scintilla" of proof that demonstrates to the court that a reasonable mind might accept the relevant evidence as adequate to support the conclusion. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The mere assertion of evidence which in and of itself justifies the agency's determination does not satisfy the substantial evidence standard. *See Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) ("*Gerald Metals*"). To provide the requisite support, the agency must offer more than conjecture and reasonably explain the basis for its decisions. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citation omitted). "[W]hile [the agency's] explanations do not have to be perfect, the path of [its] decision must be reasonably discernible to a reviewing court." *NMB Singapore Ltd.*, 557 F.3d at 1319–20 (citation omitted). Importantly, at a minimum, a determination must necessarily include an expla-

nation of the standards applied and the analysis leading to the conclusion, thereby demonstrating a rational connection between the facts on the record and the conclusions drawn. *See Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). That there may be two inconsistent conclusions drawn from the evidence "does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). Even where there are two fairly conflicting views in the record, the court must not displace the agency's choice for its own had the matter been before the bar de novo. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). However, the agency's discretion is not unbounded, and the court will not accept a determination that "entirely fail[s] to consider an important aspect of the problem . . . ." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

An agency determination is in accordance with law when that decision is constitutional, and not contrary to statute, regulation, precedent, or procedures. *See FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003). The failure of an agency to candidly comply with the instructions in a remand order not only shows a disregard for the issuing court's authority, but it is also an act that is contrary to law. *See, e.g., Smith Corona Corp. v. United States*, 915 F.2d 683, 688 (Fed. Cir. 1990) (noting that a decision of the Court has controlling effect when rendered).

IV.
Discussion

Plaintiffs NSK and JTEKT contend that the ITC's analysis of the issues on remand is not supported by substantial evidence nor in accordance with law.[5] The court's opinions in *NSK I* and *NSK II* effectively remanded three issues to the agency to reconsider. In examining the *Remand Determination* under the applicable standard of review, the court finds that the agency's determinations here do not pass muster because the ITC failed to (1) fully comport with the

[5] NSK's comments on the *Remand Determination* focus exclusively on two of the remanded issues – the likely impact of the subject imports and the supply conditions therein, and the cumulation of ball bearings from the United Kingdom with other subject imports – whereas JTEKT's comments center on the issue of causation and the role of non-subject imports. NSK incorporates by reference JTEKT's comments on the issue of causation and non-subject imports, while JTEKT adopts NSK's comments on the ITC's decision to cumulate the subject imports. NSK Comments at 30–31; JTEKT Comments at 3 n.2. JTEKT takes no position on the ITC's reassessment of its vulnerability and impact findings. JTEKT Comments at 3 n.2.

court's remand instructions and (2) meaningfully demonstrate a rational connection between the facts in the record and the conclusions reached.

A.
The Causation Inquiry & the Analysis of Non-Subject Imports

On remand, Defendant reaffirmed its original position that "revocation of the antidumping duty orders covering ball bearings from Japan and the United Kingdom is likely to result in the continuation or recurrence of material injury by reason of subject imports." *Remand Determination* at 37. Plaintiff JTEKT argues that another remand is needed so that the ITC may fully address the impact of the non-subject imports on the U.S. market. JTEKT alleges that the ITC acted contrary to law by not addressing the fundamental concerns of the court's remand instructions. JTEKT Comments at 2–3, 8–9, 27. Moreover, JTEKT claims that the agency failed to adequately consider certain data that is outcome determinative. JTEKT Comments at 8–27.

The ITC acted contrary to law when it failed to genuinely comply with the court's remand instructions. The agency dedicates nearly a third of its remand analysis to vociferously disagree with the court's holding in *NSK I*.[6] *Remand Determination* at 4–17.[7] More specifically, the ITC argues that the non-subject import analysis is limited to original injury investigations and other similar retrospective inquiries on causation. *Id.* at 9–11. In the ITC's interpretation, the Federal Circuit in *Mittal* ruled that the non-subject import analysis does not apply to a "prospective replacement analysis" like that in a sunset reviews. *Id.* at 10. Finally, notwithstanding the court's holding in *NSK II*, the agency also alleges that the court unlawfully forced it to perform a replacement/benefit test on remand – an examination that the ITC calls the "market share replacement analysis" and which it

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[6] As part of its discussion, Defendant cites to *Nucor Corp. v. United States*, 32 CIT ___, 594 F. Supp. 2d 1320 (2008). In that decision, the Court found that the ITC need not conduct a non-subject import analysis in a sunset review when certain factual conditions are present, noting that the Federal Circuit has apparently limited the agency's use of said analysis to original injury investigations. *Nucor Corp.*, 32 CIT at ___, 594 F. Supp. 2d at 1380. However, the Court stated that its decision "should not be read to provide the [ITC] license to unilaterally disregard data related to non-subject imports during a sunset review" and may consider that information in its analysis "if it finds that such imports are a 'relevant economic factor [ ]' to its determination" under § 1675a(a)(2) and (a)(4). *Id.*, 32 CIT at ___, 594 F. Supp. 2d at 1382. This court disagrees with the analysis in *Nucor Corp.* on this issue for the reasons explained in *NSK I* and *NSK II*.

[7] The court expects that the ITC will not repeat these arguments in its next remand determination as they are more properly directed to the Federal Circuit.

alleges is similar in kind to one described as unlawful by the Federal Circuit. *See id.* at 7, 11–12 (citing *Mittal*, 542 F.3d at 879).[8]

The relevant statutes that describe the ITC's task in a sunset review clearly contain an element of causation, a point that is reaffirmed by the Court's precedent and which Defendant acknowledges in the *Remand Determination*. §§ 1675(c), 1675a(a); *see also Usinor v. United States*, 26 CIT 767 (2002) (not reported in F. Supp.); *Neenah Foundry Co. v. United States*, 25 CIT 702, 155 F. Supp. 2d 766 (2001); *Titanium Metals Corp. v. United States*, 25 CIT 648, 155 F. Supp. 2d 750 (2001). Equally important here is the doctrine of *stare decisis*, which states that "when [a] court has once laid down a principle of law as applicable to a *certain state of facts*, it will adhere to that principle, and apply it to all future cases, where *facts are substantially the same* . . . ." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990) (emphasis added). Of paramount concern in *Gerald Metals, Bratsk, Mittal* and *NSK I* was whether the subject imports were the cause of injury, or would cause continuation or recurrence of injury, to the domestic industry. The causation analysis in *Gerald Metals, Bratsk, and Mittal* involved commodity products in which fairly-traded, price competitive non-subject imports were a significant factor in the market, facts which are substantially similar to those before the court in this action.[9] *Mittal*, 542 F.3d at 870–71; *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1333-34; *Bratsk*, 444 F.3d at 1373–76; *Gerald Metals*, 132 F.3d at 720–23. Guided by its analysis of the pertinent statutes and by its understanding of the obligations charged to the ITC in light of the controlling precedent, the court held that the agency could not justify its affirmative determination on the causation issue without a more thorough examination of non-subject imports. *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1330–33. Regardless of its view on the validity *vel non* of every decision from the bench, the agency must nevertheless fully comply with a court's remand instructions. *Smith Corona Corp.*, 915 F.2d at 688.

The court acknowledges that its remand instructions in *NSK I* on the causation issue may have provided the ITC with some confusion. However, the court alleviated any such uncertainty when it issued *NSK II*. Defendant had asked the court to reconsider its opinion in *NSK I* in light of *Mittal*. In *NSK II*, the court thoroughly examined the obligations that Congress imposed on the ITC in a sunset review. 32 CIT at ___, 593 F. Supp. 2d at 1363–1372. The court made clear

[8] The ITC also disagrees with the court's consideration of the factual conditions that triggered the non-subject imports analysis, an issue that is outside the scope of the remand instructions and one that the court will not address here. *Id.* at 14–17.

[9] A "commodity product" is a good that is "generally interchangeable regardless of its source." *Bratsk*, 444 F.3d at 1371.

that "the only duty imposed on the ITC is to ensure that the subject imports, and not non-subject imports or some other factor, would be substantially responsible for injury to the domestic industry." *Id.*, 32 CIT at ___, 593 F. Supp. 2d at 1365. Critically, the court explicitly emphasized that it does not require the ITC to conduct its causation inquiry in any particular manner, and reaffirmed that completing a more thorough analysis of non-subject imports would not force "the ITC to adopt[] a rigid 'benefit' analysis or sacrifice discretion in determining the likelihood of material injury under § 1675a(a)," a statement Defendant altogether ignores in the *Remand Determination*.[10] *Id.*, 32 CIT at ___, 593 F. Supp. 2d at 1360 (citing *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1333); *see also id.*, 32 CIT at ___, 593 F. Supp. 2d at 1366 (emphasizing that the ITC does not need to address the causation inquiry in any particular way). It is of great concern that, after asking the court to reconsider its opinion in *NSK I*, the ITC rarely cites to, let alone significantly discusses, the analysis of this issue in *NSK II*. The ITC rightly states that it "must examine factors other than subject imports to ensure that it is not attributing injury from other factors to the subject imports" in a way that inflates "an otherwise tangential cause of injury into one that satisfies the statutory material injury threshold." *Remand Determination* at 7. However, without a more faithful adherence to the court's remand instructions and thorough analysis of non-subject imports, the court is not convinced that the ITC conducted a meaningful inquiry on the issue of causation on remand.

Equally troubling to the court is the cursory treatment of the evidence provided and the conclusions reached by the ITC on this issue in its *Remand Determination*. The ITC incorrectly surmised that the court had asked it to conduct a rigid "market share replacement" analysis and consider "'whether non-subject imports have captured, or are likely to capture, market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to continuation or recur-

[10] The ITC also argues that §§ 1675(c) and 1675a(a) are ambiguous as to whether the ITC must perform a replacement/benefit test, and therefore the court must afford deference to the agency to interpret the statute as it pleases given that "'a court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation.'" *Remand Determination at* 13 (citing *United States v. Eurodif S.A.*, 129 S. Ct. 878, 886 (2009)). Despite Defendant's assertions to the contrary, the court did not prescribe a Procrustean formula for the ITC to follow, but rather noted that the agency could not conduct a meaningful inquiry on the issue of causation without a more thorough examination of non-subject imports. *NSK II*, 32 CIT at ___, 593 F. Supp. 2d at 1359–60 (citing *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1333). Moreover, there is nothing ambiguous about the statutes at issue, and in a sunset review the ITC must determine whether the subject imports would likely continue to materially injure or cause material injury to the domestic industry in the absence of the antidumping duty order. §§ 1675(c), 1675a(a).

rence of material injury as a result of subject imports.'"[11] *Id.* at 9, 37 (citing *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1333). Though the court explained in *NSK II* that the ITC was not required to follow a particular methodology in its causation inquiry, the agency nonetheless read the court's instructions to contain three separate inquiries:

> First, the [c]ourt directed the [ITC] to assess whether "non-subject imports *have captured* . . . the market share previously held by the subject imports." [*NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1333] (emphasis added). Second, the [c]ourt instructed the [ITC] to assess whether the "non-subject imports . . . are *likely to capture* market share previously held by the subject imports" in its analysis. *Id.* [(emphasis added)]. Third, to the extent the non-subject imports have or will capture the market share held by the subject imports, the [c]ourt has instructed the [ITC] to assess "whether this level of displacement makes it unlikely that removal of the orders will lead to continuation or recurrence of material injury as a result of subject imports." *Id.*

Id. at 37 n.260. The court will comment on this analysis to give further guidance to the ITC in preparing its new remand results.

The ITC first determined that non-subject imports did not "fully, or even mostly, capture[] the market share previously held by the subject imports before the orders were put in place." *Id.* at 37–38. The agency noted that while the subject imports "lost approximately seven percentage points of market share during the period from 1987 through 2005," the subject merchandise remained a consistent and significant presence in the market after the orders were imposed, maintaining a market share between 11.5% and 14% over that time. *Id.* at 38. The agency noted that although the market share of non-subject imports grew from 5.2% in 1987 to 23.6% in 2005, "most of the market share increases obtained by the non-subject imports occurred at the expense of the domestic industry . . . ." *Id.* at 38–39. The ITC then summarily concluded that because the subject imports "actually gained a small amount of market share from the other participants in the market between 2000 and 2005," the agency had sufficiently established that "non-subject imports have captured no market share

[11] In one of the few instances in which the ITC mentions *NSK II* in the *Remand Determination*, Defendant cites to this quoted passage as proof that the agency must determine whether non-subject imports captured the market share previously held by the subject imports. *Id.* at 37 n. 260, 39 n.272 (citing *NSK II*, 32 CIT at ___, 593 F. Supp. 2d at 1372). However, a closer reading of that passage demonstrates that the focus of the court's discussion was on the factual conditions that triggered the non-subject import analysis in *Gerald Metals, Bratsk*, and *Mittal*, just as they did in *NSK I*. *NSK II*, 32 CIT at ___, 593 F. Supp. 2d at 1372.

at all from subject imports . . . .” *Id.* at 39. Apart from this conclusory statement, the ITC does not justify its finding on the first prong with any additional evidence.

The court cannot reasonably discern how the ITC concluded that subject imports are more than a mere minimal or tangential cause of likely injury to the domestic industry, especially when most of the non-subject imports’ market share increases occurred at the expense of the domestic industry. The ITC fails to explain why the period from 2000 to 2005 is most indicative of trends in the subject imports’ market share, especially when a more broad analysis that covers market share fluctuations over the life of the antidumping duty order seems most logical. Moreover, the agency does not reveal the identity of the “other participants” in the market from which subject imports gained market share, an omission that is significant because domestic products, as well as subject and non-subject imports, are normally the only components that comprise the domestic market in this context. Even more troubling to the court is that the agency acknowledges, albeit in a footnote, that non-subject imports are certain to deleteriously affect the domestic market:

> [B]ecause the non-subject imports entered the market and took market share primarily from the domestic industry, we find that it was not the [antidumping duty] orders that drew most of the non-subject imports into the market, but the attractiveness of the U.S. market. In our view, this indicates that non-subject imports will not readily exit the market and will compete aggressively with the likely significant volumes of subject imports that enter the market after the revocation of the orders, in attempting to maintain their existing market share. This intense competition between the subject and non-subject imports will likely have a significant adverse impact on domestic market share, sales volumes and revenues, and pricing.

Id. at 39 n.271. In spite of this evidence and the obvious gaps in logic, the ITC concluded that subject imports are a more than minimal or tangential cause of the likely injury to the domestic industry.

The ITC’s lack of rigor is further demonstrated in its analysis of whether “non-subject imports . . . are *likely to capture* market share previously held by the subject imports.” *Id.* at 39 (citing NSK I, 32 CIT at ___, 577 F. Supp. 2d at 1333). Again using historical market share trends, the ITC determined that “while the non-subject imports did capture some market share from the subject imports before [2000], they have not captured any meaningful level of market share from the subject imports since [2000].” *Id.* at 39. These historical trends, coupled with evidence of the subject imports’ steady market

share, led the agency to therefore conclude that "in the reasonably foreseeable future non-subject imports are [un]likely to capture the market share previously held by the subject imports before the orders were imposed." *Id.* at 39. The ITC explained that "the presence of the non-subject imports in the market will not prevent the subject imports from seeking to regain market share in a significant fashion from the domestic industry[] once the disciplining effects of the orders are removed." *Id.* at 40.

The court is not persuaded and, more importantly, the ITC's analysis here misses the point. In its examination of the second prong, the agency merely asserts that the evidence it deemed sufficient to satisfy the first prong of the "market share replacement" test is equally compelling in its analysis of the second prong. Crucially, however, the ITC does not set forth the groundwork which explains why the historical data on market share trends rationally explains that the subject imports play more than a minor role in causing the likely continuing or recurring injury to the domestic industry. The ITC also fails to explain and support its view that subject producers would be able to drop prices to the levels required to recapture market share from the non-subject imports. Instead, the ITC's *Remand Determination* includes nothing more than broad conclusory statements that leave the court in the dark and unable to discern how the agency connected the dots between the facts on the record and the conclusions stated on remand.

Finally, and crucially, the ITC failed to adequately explain why subject imports would be more than a minimal or tangential cause of likely injury given the significant price underselling by non-subject imports. The ITC conducted certain price comparisons, which showed non-subject imports "undersold the domestic like products in approximately 66[%] of possible price comparisons and undersold the subject imports in approximately 72[%] of the possible price comparisons." *Id.* at 41. While the ITC attributes the non-subject imports' underselling activity to the "volume-and price-disciplining effects" of the antidumping duty orders, the agency also emphasizes that its earlier analysis demonstrates that "subject imports will, upon revocation of the orders, begin aggressively underselling the domestic and non-subject merchandise in an attempt to regain the market share that they have lost . . . ." *Id.* That data, the ITC claims, sufficiently shows that the "levels of underselling by the subject imports are likely to have a significant adverse effect on both domestic and non-subject prices, and on the overall condition of the industry." *Id.* The agency's determination is problematic. First, the ITC presumes, without providing any evidence to support its claim, that the subject imports will be in a position to compete successfully against non-subject imports once the antidumping duty order is removed. This error echoes those

found in other sections of the non-subject analysis: the justifications provided for its conclusion lack reason and substance. Moreover, the ITC cannot rely on its earlier analysis of the likely underselling by subject imports to support its determination because that examination was itself inadequate. In other words, the ITC fails to directly address the significant underselling by non-subject imports, and instead side-steps the issue using unpersuasive and incomplete reasoning.

In sum, the ITC failed to comply with the court's remand instructions on the issue of causation, and the evidence on record and the conclusions reached in the *Remand Determination* do not establish a causal link between the subject imports and likely future injury to the domestic industry. It may well be that the fact that the market share of the subject imports did not change significantly from 2000 to 2005 shows that they remain more than a mere minimal or tangential cause of injury to the domestic industry. However, the court cannot determine that threshold issue on the record before it, absent a more complete analysis of the role of non-subject imports in the market. In its second remand determination, the agency must perform a more focused analysis on the causation issue to determine whether the subject imports are more than a mere minimal or tangential cause of injury in light of the significant presence of non-subject imports in the domestic market. Without that analysis, the ITC cannot "give full consideration to the causation issue and [ ] provide a meaningful explanation of its conclusions." *Mittal*, 542 F.3d at 878.

B.

The Cumulation of Ball Bearings from the United Kingdom with other Subject Imports

The ITC "may cumulatively assess the volume and effect of imports of the subject merchandise from all countries . . . if such imports would be likely to compete with each other and with domestic like products in the United States market." § 1675a(a)(7). Notably, the agency shall not cumulate imports of the subject merchandise in cases where it determines that such imports are not likely to have a discernible adverse impact on the domestic industry. *Id.* Thus, the cumulation question involves a two-step process, whereby the agency must first ask whether the subject imports will have any discernible impact. *See Neenah Foundry Co.*, 25 CIT at 712, 155 F. Supp. 2d at 775. If the ITC answers that question affirmatively, then the remaining question is whether that impact is adverse. *See id.* Only where the impact is both discernible and adverse may the ITC cumulate the

subject imports. *See id*. In *NSK I*, the court asked the agency to reexamine its decision to cumulate ball bearings from the United Kingdom with imports from other subject countries. 32 CIT at ___, 577 F. Supp. 2d at 1338. More specifically, the court found that "the ITC failed to address the significant rise in non-subject imports and large scale restructuring within the ball bearing industry . . . ." *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1338. The court therefore remanded the ITC's decision to cumulate, and in particular its analysis of the discernible adverse impact of the U.K. ball bearings, (1) "for additional explanation as to whether the potential volumes of U.K. exports . . . are likely to have an adverse impact on the domestic industry if the order is removed," as well as (2) for a more thorough analysis of non-subject imports. *Id.*, 32 CIT at ___, 577 F. Supp. 2d at 1338.

On remand the ITC reaffirmed its earlier decision, finding that the subject imports from the United Kingdom "are likely to have a discernible adverse impact on the domestic industry if the order is revoked." *Remand Determination* at 21. NSK argues that the ITC does not support its redetermination of this issue with substantial evidence, and that the court should remand anew the issue of cumulation.[12] NSK Comments at 2–17. JTEKT similarly claims that the *Remand Determination* does not adequately confront the concern

[12] NSK lobbies a host of criticisms against the ITC's *Remand Determination*, none of which the court explores in detail here for reasons explained below. More specifically, NSK contends that substantial evidence does not support the ITC's claim that the size alone of the ball bearing industry in the United Kingdom will likely have a discernible and adverse affect on the domestic industry, especially when compared to the ITC's decision in a related investigation which found that the subject imports from Singapore, a country whose ball bearing industry is much larger in size than that in the United Kingdom, would not be likely have a discernible adverse impact. NSK Comments at 2–4. NSK goes on to criticize the agency's analysis of other elements of the U.K industry, specifically noting that the industry is similar in character to the industry in Singapore; that the production priorities of the U.K. producers do not focus on the U.S. market; and that the remaining U.K. production capacity cannot be geared toward the United States because restructuring within one of the largest U.K. producers with excess capacity restricts that company's ability to ship ball bearings to the United States. NSK Comments at 3–6. NSK also rejects the ITC's finding that the export focus of the U.K. industry makes it likely that subject U.K. imports will have a discernible adverse impact because the statistics for the U.K. and Singapore industries are nearly identical, and the agency found the latter to have no likely discernible adverse impact. NSK Comments at 7–10. NSK also discounts the ITC's finding that the volume (in terms of value) of the U.K. industry's shipments makes it likely that subject imports from the United Kingdom will have a discernible adverse impact, alleging that the agency failed to consider that British ball bearings generally involve higher-value, unique products that cannot be utilized in the United States. NSK Comments at 10–14. Finally, NSK avers that the limited U.K. price data prevents the ITC from drawing any conclusions about the price effects of ball bearings from the United Kingdom. NSK Comments at 14–15.

surrounding the significant presence of non-subject imports in the domestic market. JTEKT Comments at 2–27.

1.
Restructuring within the Ball Bearing Industry

After the agency recycled much of the analysis it originally provided in the second sunset review, *Remand Determination* at 21–24, the ITC first addressed the issue of restructuring within the ball bearing industry and found that "the domestic industry suffered serious declines in its production levels, sales volumes, sales revenues, income, profit margins, market share and employment, and that these declines cannot be attributed solely, or even primarily, to the industry's 'restructuring' efforts." *Id.* at 25. Here, the agency incorporated by reference its discussion of restructuring in the ball bearing industry that appears later in the report in its reassessment of the likely impact of the subject imports on the domestic market. *Id.* at 24–25. In that analysis, the ITC provides three principal justifications for its determination that the domestic market is vulnerable and that subject imports will likely have a negative impact on the domestic industry. First, the agency found that the domestic industry's capacity and production reductions are a result of competition from subject imports, and not from restructuring within the ball bearing industry. *Id.* at 31–32. The bases for the ITC's conclusion were that (1) only two domestic producers stated that the drop in production capacity was intended to retool their capacity to produce high-valued, customized bearings; (2) the majority of producers who reduced production capacity did so because of their inability to meet "aggressive import competition" in the U.S. market; and (3) the three domestic producers that reported the largest capacity declines during the period "all stated that they closed production facilities in the United States due, in significant part, to price competition from subject and/or non-subject imports." *Id.* at 31. The evidence that the ITC cites to support its conclusion is tenuous. Importantly, only one of the twenty companies that reported U.S. production capacity figures for the 2000 to 2005 period actually stated that the *subject imports* were responsible for the changes in production capacity. *See Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom: Investigation Nos. 731–TA–344, 391–A, 392–A and C, 393–A, 394–A, 396, and 399–A* (*Second Review*), USITC Pub. 3876 (Aug. 2006) ("*Staff Report*") at BB–I–48 to I–55, Table BB–I–13. Moreover, a closer look at the top three companies who accounted for more than three-quarters of the reduction in U.S. production capacity during the period of review confirms that the overall decrease in

production capacity took place as part of those companies' efforts to restructure their U.S. business platform for reasons totally unrelated to the subject imports. *See id.* at BB–I–48 to I–55, Table BB–I–13; *id.*, BB–III–1 to III–5, Table BB–III–1. The ITC failed to account for this conflicting evidence on the record when it stated its conclusions, and it must explain rationally why such evidence is insignificant to its finding on the next remand. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (explaining that the ITC must address contradictory evidence or evidence from which conflicting inferences may be drawn in its analysis).

Second, the ITC determined that "even if the reductions in the industry's capacity could be attributed to a strategic decision on the industry's part . . . , the declines in the industry's capacity levels do not fully account for the corresponding declines in the industry's production levels and sales volumes during the period of review." *Remand Determination* at 32. The agency found that while capacity fell by 110.4 million ball bearings from 2000 to 2005, production and shipment levels fell by 125 million ball bearings over the same period, which represented a drop that was "approximately 15 million bearings larger than the decline in the industry's capacity during the period." *Id.* Without any additional analysis or explanation, the ITC hastily concluded in the next sentence that because the "15 million bearing decline represents approximately 12[%] of the declines in the industry's total production and shipment quantities between 2000 and 2005," the decline in the industry's production, shipment and sales levels "cannot be attributed to the reductions in the industry's capacity during the period, whether or not that reduction was designed to rationalize its bearing production in the U.S. and other markets." *Id.* However, the ITC does not explain, for example, how this data answers the courts concern regarding the effect of restructuring within the ball bearing industry, or why the period from 2000 to 2005 is the best time frame in which the agency must look to alleviate the court's concerns. That there were declines in the domestic industry's production, shipment and sales levels does not necessarily mean that the domestic industry was vulnerable to likely material injury from the subject imports, and the ITC's failure to offer some meaningful explanation is yet another example of the absence of a rational connection between the facts and conclusions in the *Remand Determination*.

Finally, the ITC examines certain economic indicia to discredit the claim made by NSK that the domestic industry is stronger, more robust, and healthier as a result of restructuring in the ball bearing industry. In particular, the ITC analyzed (1) gross profits and operating income levels, (2) gross profit and operating income margins, (3) cost structures, (4) capacity utilization rates, (5) net sales revenues,

and (6) market share levels. *See id.* at 32–34. In assessing each of these six components, the ITC concluded that restructuring within the ball bearing industry did little to improve the health of the domestic industry. *See id.* Notwithstanding the ITC's thorough analysis of these factors, the court is still left with the question of "whether the potential volumes of U.K. exports . . . are likely to have an adverse impact on the domestic industry if the order is removed." *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1338. Here, the ITC did little to expand on its earlier analysis of the potential volumes of U.K. exports in the *Remand Determination*. That restructuring of the ball bearing industry did not improve the health of the domestic market does not necessarily mean that the potential volumes of U.K. exports will have a likely discernible impact if the antidumping order is removed. Without more, the court cannot sustain the ITC's analysis on remand.

2.
The Presence of Non-Subject Imports in the Domestic Market

On the effect of non-subject imports and the ITC's decision to cumulate the subject imports, the agency determined that "the increase in non-subject imports has not resulted in a significant displacement of the subject U.K. ball bearings during the period of review."[13] *Remand Determination* at 25. The ITC reiterated that the non-subject imports did not "significantly replace[ ] the subject imports from the United Kingdom" or "capture significant market share from the U.K. imports . . . ." *Id.* The ITC also noted that, upon revocation of the order, "the subject U.K. imports are likely to begin pricing their products more aggressively in the market in order to recover any market share that may have been lost immediately after imposition of the U.K. order." *Id.* The agency closes its analysis explaining that its conclusions are "not affected by the fact that non-subject imports occupy a considerably larger share of the market than the subject imports from the United Kingdom." *Id.* Curiously, the agency does not provide an explanation as to why that fact is inconsequential to its analysis, but instead reminds the court that the discernible adverse impact standard presents a "relatively low threshold" and is "relatively easy" for the ITC to satisfy. *Id.*

For the reasons explained above in Section III.A, the ITC's analysis of non-subject imports is contrary to law and, therefore, the agency's reliance on its conclusions from that portion of the *Remand Determination* is unhelpful. Furthermore, the ITC's analysis here does nothing more than assert broad conclusions, with each statement lacking

[13] In considering this issue on remand, the ITC expressly incorporated its analysis of the non-subject imports that is discussed and reviewed by the court in Section III.A of this opinion. *Remand Determination* at 25.

concrete and rational grounds for the agency's ultimate determination. The ITC also does not explain how the subject imports from the United Kingdom are well suited to begin pricing their products more aggressively in the market to recover market share once the order is revoked. Finally, that the discernible adverse impact standard presents a "relatively low threshold" does not license the ITC to act arbitrarily, nor does it absolve the agency from its duty to address an import aspect of the problem. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

Thus, the court asks the ITC to revisit this issue for a third time to provide a more careful and reasoned examination of (1) the large scale restructuring within the ball bearing industry and (2) the significant rise in non-subject imports in the domestic market.

C.
The Vulnerability of the Domestic Market and the Likely Impact of Subject Imports on the Domestic Industry

To make a proper injury determination, the ITC must consider the likely impact of imports of the subject merchandise on the industry if the order is revoked. § 1675a(a)(1). As part of that inquiry, the agency evaluates "all relevant economic factors described in [§ 1675a(a)(4)] within the context of the business cycle and the conditions of competition that are distinctive to the affected industry." § 1675a(a)(4). In the second sunset review, the ITC divided the conditions of competition into three categories: supply, demand, and substitutability. *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1338. In the second sunset review, the ITC did not account for the significant restructuring within the industry when it made its determination on this issue. *Id.*, 32 CIT at ___, 577 F. Supp. 2d at 1339. The court therefore instructed the ITC to reconsider the supply conditions within the domestic market, and to specifically reassess the agency's vulnerability and likely impact findings in light of the significant restructuring within the global ball bearing industry. *Id.* The court explained that the record suggests "global restructuring had the effect of depressing certain economic measures of industry performance relied upon [by the ITC] to cast the U.S. market as vulnerable," and "[w]hether the domestic industry is vulnerable to increased volumes of subject imports or simply responding to other market forces is an appropriate inquiry" for the ITC to perform on remand. *Id.*

On remand, the ITC found that "serious declines in almost all significant indicia of the industry's condition establish that the industry was in a weakened condition at the end of the period and was therefore vulnerable to likely material injury from the subject imports." *Remand Determination* at 31. NSK argues that the ITC does not support its reassessment of the likely impact of the subject im-

ports with substantial evidence. First, NSK disagrees with the ITC's finding that the subject imports, rather than global restructuring within the ball bearing industry, are the source of the decline in U.S. production capacity. NSK Comments at 18–21. Second, NSK charges that changes in U.S. production volume are not by reason of the subject imports and therefore it is unlikely that the subject ball bearings will have a negative impact on the domestic industry. NSK Comments at 21–24. Finally, NSK contends that certain financial indicators do not support the ITC's determination that subject imports will likely have a negative impact on the domestic industry. NSK Comments at 24–30.

For the reasons explained above in Section III.B.1 of this opinion, the ITC failed to sufficiently address the effect of restructuring within the ball bearing industry in its analysis on remand. The agency did not genuinely respond to the court's inquiry of whether the domestic industry is vulnerable to increased volumes of subject imports or is simply responding to other market forces. On this issue, the ITC does not connect the evidence on the record with its conclusions in a rational fashion, and it fails to meaningfully address conflicting evidence on the record when it stated its conclusions. Moreover, the agency merely recites positions that the court found unpersuasive in *NSK I*. Therefore, the court remands this issue to the ITC for a second time so that it may more thoroughly analyze the significant restructuring in the ball bearing industry and its effect on (1) the vulnerability of the domestic market and (2) the likely impact of the subject imports on the domestic market. The ITC must also address conflicting evidence on the record in reaching its conclusions on this issue. *See Suramerica de Aleaciones Laminadas, C.A.*, 44 F.3d at 985.

V.
Conclusion

For the foregoing reasons, the court holds that the *Remand Determination* is not supported by substantial evidence or in accordance with law. The ITC acted contrary to law when it failed to determine whether the subject imports are more than a minimal or tangential cause of likely injury to the domestic industry given the significant presence of non-subject imports in the domestic market. The ITC also failed to support its (1) decision to cumulate ball bearings from the United Kingdom with other subject imports and (2) analysis of the likely impact of subject imports on the domestic industry with substantial evidence. Accordingly, it is hereby

ORDERED that the ITC's *Remand Determination* is not supported by substantial evidence or in accordance with law, and that the case

is therefore **REMANDED** to the ITC for further proceedings not inconsistent with this opinion. Specifically, it is

ORDERED that the ITC must comply with the court's instructions on the issue of causation in *NSK I* and *NSK II* and discern whether the subject merchandise would likely continue to materially injure or cause material injury to the domestic industry if Commerce revoked the antidumping duty order. That inquiry necessarily requires the ITC to determine whether, in light of the significant presence of non-subject imports, the subject imports are more than a mere minimal or tangential factor in the material injury to the domestic industry that is likely to continue or recur in the absence of the antidumping duty order; it is further

ORDERED that the ITC must reexamine its decision to cumulate ball bearings from the United Kingdom with other subject imports. In so doing, the ITC must provide a more careful and reasoned examination of (1) the large scale restructuring within the ball bearing industry and (2) the significant rise in non-subject imports in the U.S. market. In the second remand proceeding, the agency must demonstrate a rational connection between the evidence on the record and the conclusions it reaches, as well as provide a more through account of the conflicting evidence on the record and an explanation as to why that evidence is not relevant or is unpersuasive; it is further

ORDERED that the ITC must revisit its determination on the vulnerability of the domestic market and the likely impact of subject imports on the domestic market. In providing a more rigorous and reasoned examination of the likely impact of the subject imports on the domestic industry, the ITC must meaningfully (1) analyze the significant restructuring in the ball bearing industry and its effect on the vulnerability of the domestic market and the likely impact of subject imports on said market, as well as (2) address conflicting evidence on the record in reaching its conclusions and explain why that evidence is irrelevant or is unpersuasive; and it is further

ORDERED that the ITC shall have until January 5, 2010, to file its remand results with the Court. All other parties shall file their comments on the ITC's second remand determination with the Court no later than February 4, 2010.

Dated: August 31, 2009
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 09–92

CANADIAN WHEAT BOARD and the GOVERNMENT OF CANADA, Plaintiffs, and GOVERNMENT OF ALBERTA, GOVERNMENT OF ONTARIO, and GOVERNMENT OF SASKATCHEWAN, Plaintiff-Intervenors, v. UNITED STATES and the UNITED STATES DEPARTMENT OF COMMERCE, Defendants.

Before: Richard K. Eaton, Judge
Consol. Court No. 07–00058

[Defendants' motion for reconsideration denied; plaintiffs' and plaintiff-intervenors' motion for reconsideration granted]

Dated: September 1, 2009

Steptoe & Johnson LLP (*Mark A. Moran, Jamie B. Beaber,* and *Matthew S. Yeo*), for plaintiff Canadian Wheat Board.

Weil, Gotshal & Manges LLP (*M. Jean Anderson, John M. Ryan*, and *Peter J.S. Kaldes*), and *Wilmer Cutler Pickering Hale and Dorr LLP* (*Seth P. Waxman, Randolph D. Moss, Mark C. Fleming*, and *Danielle G. Spinelli*), for plaintiff Government of Canada.

Arnold & Porter LLP (*Lawrence A. Schneider*), for plaintiff-intervenor Government of Alberta.

Hogan & Hartson LLP (*Mark S. McConnell, H. Deen Kaplan*, and *Jonathon T. Stoel*), for plaintiff-intervenor Government of Ontario.

Cameron & Hornbostel LLP (*Michele Sherman Davenport*), for plaintiff-intervenor Government of Saskatchewan.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Scott D. McBride*), of counsel, for defendants.

OPINION

Eaton, Judge:

I.
INTRODUCTION

This matter is before the court on the motion of defendants, the United States and the United States Department of Commerce ("Commerce" or "the Department"), for reconsideration, and the joint motion of plaintiffs, Canadian Wheat Board ("CWB") and the Governments of Canada[1] (collectively, "plaintiffs") for clarification.

[1] Plaintiff the Federal Government of Canada originally filed a suit under Court No. 07–00059. That action was consolidated with this action under Consol. Court No. 07–00058. Prior to consolidation, the Federal Government of Canada filed a consent motion to intervene in Court No. 07—00058, as did the governments of the provinces of Saskatchewan, Alberta, and Ontario. Each was granted plaintiff-intervenor status in Consol. Court No.

See Defs.' Mot. Reconsideration ("Defs.' Mot."); Mot. Clarification ("Pls.' Mot."). These motions follow the court's decision in *Canadian Wheat Board v. United States*, 32 CIT __, 580 F. Supp. 2d 1350 (2008) ("*Wheat Board II*"),[2] which held: (1) that Commerce must liquidate all of CWB's pre-*Timken* notice entries, whose liquidation has been suspended, without regard to duties; and (2) that the Governments of Canada lacked standing to sue under Article III of the Constitution.

As set forth at length in Wheat Board II, jurisdiction lies under 28 U.S.C. § 1581(i)(4). *See* 32 CIT at __, 580 F. Supp. 2d at 1357-64; *see also Canadian Wheat Bd. v. United States*, 31 CIT __, 491 F. Supp. 2d 1234 (2007) ("*Wheat Board I*"). Because the motions ask the court to consider important questions not previously addressed, it will treat them both as motions for reconsideration.[3] For the following reasons, defendants' motion for reconsideration is denied, and plaintiffs' motion for reconsideration is granted.

II.
STANDARD OF REVIEW

The granting of a motion for reconsideration is within the court's sound discretion. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990) (not reported in the Federal Supplement).

III.
DISCUSSION

I. Defendants' Motion

In *Wheat Board II* the court considered questions relating to the liquidation of CWB's entries of hard red spring [HRS] wheat from Canada. By its motion the United States, on behalf of Commerce, makes a new argument that the court was statutorily barred from hearing plaintiffs' claims. In making its argument, defendants assert that "the statute upon which the Court concluded that Commerce had suspended liquidation of entries of hard red spring wheat from

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07–00058. In this opinion, and in *Canadian Wheat Board v. United States*, 32 CIT __, 580 F. Supp. 2d 1350 (2008), the Federal Government of Canada together with the governments of Saskatchewan, Alberta, and Ontario are referred to as the "Governments of Canada."

[2] Familiarity with the court's October 20, 2008 opinion is presumed.

[3] *See* Pls.' Mot. 3 n.1 ("Should this Court conclude that this issue is more properly addressed by means of a motion for modification or reconsideration, we respectfully request that the Court treat this submission as such a motion.").

Canada . . . [19 U.S.C. § 1516a(g)(5)(C)[4]], expressly prohibits any judicial action with respect to Commerce's actions concerning the statutory suspension of liquidation." Defs.' Mot. 4 (citing 19 U.S.C. § 1516a(g)(5)(C)(iv)[5]) (internal citation omitted). Central to defendants' claim are their assertions that liquidation of CWB's merchandise was suspended pursuant to the provisions of 19 U.S.C. § 1516a(g)(5)(C) and that the court in *Wheat Board II* unlawfully reviewed Commerce's "actions" taken pursuant to that subsection. Thus, defendants' motion is dependent upon two sets of alleged facts: (1) that the court in *Wheat Board II* found that liquidation of CWB's merchandise had been suspended under § 1516a(g)(5)(C); and (2) that, in its *Wheat Board II* decision, the court was reviewing actions taken by Commerce pursuant to § 1516a(g)(5)(C).

Plaintiffs dispute both of these assertions. First, plaintiffs insist:

> [A]s the United States is well aware, the CWB entries at issue in this action were never suspended pursuant to section 1516a(g)(5)(C). That section provides for "continued suspension of liquidation" of entries during an appeal to a NAFTA panel of the results of an administrative review or scope determination. The hard red spring wheat entries at issue here were never the subject of an administrative review or scope determination. Rather, the entries were suspended pursuant to 19 U.S.C. § 1675 when the CWB requested an administrative review and, subsequently, by this Court's injunction when the request for administrative review was withdrawn. Because the entries at

[4] This provision states:

> (C) Suspension of Liquidation
>
> (i) Notwithstanding the provisions of subparagraph (B), in the case of a determination described in clause
> (iii) or (vi) of subsection (a)(2)(B) of this section for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the administering authority, upon request of an interested party who was a party to the proceeding in connection with which the matter arises and who is a participant in the binational panel review, shall order the continued suspension of liquidation of those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review.

19 U.S.C. § 1516a(g)(5)(C)(i). As set out in *Tembec, Inc. v. United States*, 30 CIT 1519, 1524–25, 461 F. Supp. 2d 1355, 1360–61 (2006), *judgment vacated by Tembec, Inc. v. United States*, 31 CIT __, 475 F. Supp. 2d 1393 (2007), this subsection was designed to provide an injunction-like suspension of liquidation upon an appeal to a NAFTA binational panel of two types of final determinations made by Commerce so that liquidation results, in a NAFTA context, would parallel those that would result had an appeal been taken to this Court, i.e., liquidation would be made in accordance with the final NAFTA panel results.

[5] Title 19 U.S.C. § 1516a(g)(5)(C)(iv) provides that:

> Any action taken by the administering authority or the United States Customs Service under this subparagraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

> issue were not suspended under section 1516a(g)(5)(C), the limitation on judicial review of continued suspensions in subparagraph (C)(iv) does not apply.

Pls.' Resp. Defs.' Mot. Reconsideration ("Pls.' Resp.") 2 (citations omitted). Thus, plaintiffs argue that defendants are factually incorrect in claiming that liquidation of CWB's merchandise was suspended pursuant to § 1516a(g)(5)(C).

As to defendants' contention that *Wheat Board II* purported to review actions of Commerce made pursuant to 19 U.S.C. § 1516a(g)(5)(C), plaintiffs maintain:

> [T]he United States' argument fails even on its own (counterfactual) terms. Section 1516a(g)(5)(C)(iv) operates only to bar judicial review of action taken by Commerce under 1516a(g)(5)(C), *i.e.*, action taken to continue suspension of liquidation. It would not oust this Court of jurisdiction over actions under 28 U.S.C. § 1581(i) like this one, which do not challenge the continued suspension of liquidation, but rather Commerce's failure to liquidate entries in accordance with the final NAFTA panel decision in the case.

Pls.' Resp. 2–3. Put another way, plaintiffs claim that § 1516a(g)(5)(C)(iv) prohibits judicial review only of specified actions taken by Commerce pursuant to § 1516a(g)(5)(C)(i). According to plaintiffs, in this case no such actions were taken and hence the court was not reviewing any action taken under § 1516a(g)(5)(C)(i).

The court finds that plaintiffs are correct in both of their contentions. First, despite defendants' claims to the contrary, in *Wheat Board II* liquidation of CWB's merchandise was not suspended pursuant to 19 U.S.C. § 1516a(g)(5)(C). Rather, liquidation was suspended or enjoined pursuant to other provisions of law. *See Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1355–56 ("Plaintiff CWB's entries were made in September 2004 . . . . Liquidation of these entries was suspended on October 31, 2005[6], when CWB filed a request for administrative review of the AD/CVD Orders . . . . Thereafter, on February 26, 2007, CWB withdrew its request for administrative review. That same day, CWB moved to restrain temporarily and enjoin preliminarily the liquidation of its merchandise to allow it to litigate the merits of its case . . . .") (citations omitted). That liquidation of CWB's entries was never suspended pursuant to § 1516a(g)(5)(C) is apparent since that subsection provides for an

[6] A request for an administrative review results in the continuation of the suspension of liquidation. *See Tembec, Inc. v. United States*, 30 CIT , 461 F. Supp. 2d 1355, 1361 (2006), *judgment vacated by Tembec, Inc. v. United States*, 31 CIT __, 475 F. Supp. 2d 1393 (2007).

injunction-like suspension of liquidation following a final determination of an administrative review or scope determination. Here, there was no scope determination and there was also no administrative review because the request for such review was withdrawn. *See Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1356.

Next, defendants argue that the court was barred from reviewing the effect of its notice of revocation, (Antidumping Duty Investigation and Countervailing Duty Investigation of HRS Wheat from Canada, 71 Fed. Reg. 8,275 (Dep't of Commerce Feb. 16, 2006) ("Notice of Revocation")),[7] because 19 U.S.C. § 1516(a)(g)(5)(C) (iv) expressly precludes judicial review of "any action" taken by Commerce "under this subparagraph." For the court, the operative word is "action." *See* Defs.' Mot. 6 (citing 19 U.S.C. § 1516 (a)(g)(5)(C)(iv)). An examination of the subparagraph reveals that the "action" that Commerce is authorized to undertake under § 1516(a)(g)(5)(C)(i) is to "order the continued suspension of liquidation of those entries of merchandise" that are the subject of a completed administrative review or scope determination. *See* 19 U.S.C. § 1516(a)(g)(5)(C)(i). It is clear that the purpose of this subsection is to bar this Court from reviewing decisions of Commerce in a precise set of circumstances relating to the continuation of a suspension of liquidation following the completion of two specific administrative procedures. These continuations of the suspension of liquidation are the only actions authorized by the subsection. *See* 19 U.S.C. § 1516a(g)(5)(C)(i); 19 U.S.C. §§ 1516a(2)(B)(iii) and (vi). In this case, no party has challenged any action relating to the continued suspension of liquidation under § 1516a(g)(5)(C), nor could they, simply because there was no suspension of liquidation under that subsection.

Defendants endeavor to bolster their position by, for the first time, recharacterizing the Notice of Revocation as a "decision not to grant the benefit of section 1516a(g)(5)(C) suspensions to certain entries of subject merchandise." Defs.' Mot. 6. This recharacterization does not save defendants' argument. First, as noted, under the facts of this case there was no suspension of liquidation under 19 U.S.C. § 1516a(g)(5)(C). Second, this "decision," if in fact there ever was one, is simply not an action authorized by § 1516a(g)(5)(C).

Finally, the court notes language in *Wheat Board II* that may have led to a misunderstanding of the role played by 19 U.S.C. § 1516a(g)(5)(C) in that decision. First, the court's assertion that, "[f]or CWB, the exception found in § 1516a(g)(5)(C) applies," (*Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1367), is a misstatement to the

[7] On February 16, 2006, the Department published the Notice of Revocation, which "revok[ed] the countervailing duty order and antidumping duty order on [HRS] wheat from Canada . . . ." Notice of Revocation, 71 Fed. Reg. at 8,275.

extent it suggests that CWB relied on the suspension of liquidation found in § 1516a(g)(5)(C) in its arguments. As noted, the liquidation of CWB's merchandise was the result of other provisions of law.

In addition, in reaching its conclusions in *Wheat Board II*, the court relied on the reasoning found in *Tembec, Inc. v. United States*, 30 CIT 1519, 461 F. Supp. 2d 1355 (2006) ("*Tembec II*"), *judgment vacated by Tembec, Inc. v. United States*, 31 CIT __, 475 F. Supp. 2d 1393 (2007) ("*Tembec III*").[8] In that case, suspension of liquidation of some of the entries at issue was accomplished pursuant to § 1516a(g)(5)(C). As has been noted, however, liquidation of none of CWB's entries was suspended pursuant to § 1516a(g)(5)(C), and plaintiffs have never asserted otherwise. Rather, the reason that 19 U.S.C. § 1516a(g)(5)(C) had such a prominent place in both *Tembec II* and *Wheat Board II* is that its language and legislative history demonstrate Congress's intent that a suspension of liquidation preserves entries for liquidation in accordance with a NAFTA panel's final determination. In order to make this point, the court in *Wheat Board II* referred to *Tembec II* by stating that (1) the court "expressly adopts the *Tembec II* panel's analysis," and (2) the court adopted *Tembec II's* observation "that the 'continued' suspension of liquidation provided for in § 1516a(g)(5)(C) 'acts as the equivalent of an injunction against liquidation and thus halts liquidation until the suspension expires.'" *Wheat Board II*, 32 CIT at __580 F. Supp. 2d at 1368–70 (citation omitted); *see also Tembec II*, 30 CIT at __, 461 F. Supp. 2d at 1365–66 ("Congress, having intended parallel remedies, intended that the suspension of liquidation provided for in § 1516a(g)(5)(C) would provide the same result following a NAFTA panel decision, as would an injunction issued by this Court.").

The purpose of citing to these portions of *Tembec II* was to make the point that a suspension of liquidation under § 1516a(g)(5)(C) would preserve entries for liquidation in accordance with a final NAFTA panel ruling. It is, however, the fact of suspension that commands this result, not the means. In other words, suspension for any reason would have the same effect as suspension under § 1516a(g)(5)(C). As a result, even though none of the entries that were the subject of *Wheat Board II* were suspended in accordance with § 1516a(g)(5)(C), because liquidation was suspended under other provisions, they must be liquidated in accordance with the NAFTA panel's final ruling.

With this further explanation, the court finds that the holding and reasoning of *Wheat Board II* remain intact, *i.e.*, "Commerce is obligated to liquidate all of CWB's pre-*Timken* Notice entries, whose

[8] The *Tembec III* Court vacated as moot its prior judgment in *Tembec II*, but, having found "that the issues in *Tembec II* were decided within the context of a live controversy," kept the *Tembec II* decision in place. *Tembec III*, 31 CIT at __, 475 F. Supp. 2d at 1402–03.

liquidation has been suspended, without regard to duties." *See Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1370. Further, "[t]his result is demanded by both logic as well as the statute. That is, because the subject imports caused no injury during any time relevant to this inquiry, CWB should owe no duties." *Id.* at __, 580 F. Supp. 2d at 1370. Accordingly, defendants' motion is denied.

II. Plaintiffs' Motion

Plaintiffs ask the court to address that portion of *Wheat Board II* that dismissed the claims of the Governments of Canada for lack of Article III standing. *See* Pls.' Mot. 2; *see also Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1364–1366. The Canadian government plaintiffs do not dispute their dismissal as plaintiffs for lack of Article III standing, however, they seek to remain in this case as plaintiff-intervenors. Pls.' Mot. 2. Plaintiffs argue that when "an intervenor brings the same claims and seeks the same relief as the original plaintiff, the intervenor need not independently have Article III standing." Pls.' Mot. 5. In other words, plaintiffs argue that although any independent legal action brought by the Governments of Canada might be dismissed for lack of Article III standing, they should not be dismissed from CWB's case because they are properly plaintiff-intervenors. For the reasons that follow, the court finds that the Governments of Canada may take part in this case as permissive plaintiff-intervenors.

A.
Background

In Wheat Board II the court dismissed the Federal Government of Canada's complaint for lack of standing. *See Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1366. In doing so the court held that none of the Governments of Canada had demonstrated "injury-in-fact" independent of CWB's claimed injury. *Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1366. As plaintiffs point out, however, *Wheat Board II* examined Article III standing to bring separate actions, but not in the context of participating in the case as intervenors. *See* Pls.' Mot. 2

B.
Statutory Authorization and Intervention

Intervention before this Court is authorized by statute. *See* 28 U.S.C. § 2631(j)(1) ("Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action . . . ."). As noted in *Ontario Forest Industr. Assoc. v. United States*, 30 CIT __, __, 444 F. Supp. 2d 1309, 1322 (2006), this statute has been given a broad construction: "The phrase 'adversely affected or aggrieved,' which mirrors the language in numerous statutes, including

of Administrative Procedure Act, 5 U.S.C. § 702, represents a 'congressional intent to cast the [intervention net] broadly – beyond the common-law interests and substantive statutory rights' traditionally known to law. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998))."

Each Canadian entity has alleged an interest sufficient to demonstrate that it has been "affected" or "aggrieved" by Commerce's action within the meaning of 28 U.S.C. § 2631(j)(1). Cf. Mot. Intervene of Gov't of Canada 3 (". . . as a NAFTA Party and frequent party to U.S. AD/CVD actions against Canadian products, the [Federal] Government of Canada has broad concerns with the policy and practice of the United States of continuing to apply an AD or CVD order, to unliquidated pre-*Timken* Notice entries despite the invalidation through NAFTA binational panel review of an agency determination that was an essential underpinning of the order."). Although not NAFTA parties, the complaints of the governments of Saskatchewan, Ontario and Alberta make allegations similar to those of the Federal Government of Canada.

C.
Intervention Under Rule 24

USCIT Rule 24 ("Rule 24"), governs the right to intervene in actions brought before this Court. *See* USCIT Rule 24. Rule 24 applies to intervention as a matter of right and to permissive intervention.[9] *Id.* Here, the Governments of Canada move in the alternative for intervention as of right or by permission. *See* Pls.' Reply Supp. Mot. Clarification ("Pls.' Reply") 7, 7 n.3. Because it finds that the Governments of Canada may proceed by permission, the court will address permissive intervention only.

In March of 2007 the Federal Government of Canada and the provinces of Alberta, Ontario and Saskatchewan each filed motions to intervene in the case brought by CWB. *See* Consent Mot. Intervene as Plaintiff-Intervenor by Gov't of Canada; Consent Mot. Intervene by Gov't of Alberta; Consent Mot. Intervene by Gov't of Ontario; Consent Mot. Intervene as Plaintiff-Intervenor by Gov't of Saskatchewan. Each of these motions was accompanied by a complaint. *Id.* Each motion was consented to by defendants, although this consent stated that it was for "procedural convenience . . . , without waiving any argument concerning standing or any other issue." *See, e.g.*, Consent Mot. Intervene as Plaintiff-Intervenor by Gov't of Canada 4. While defendants claim that the Governments of Canada may not proceed

[9] USCIT Rule 24(b) states in pertinent part:

> (b) Permissive Intervention
>
> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . .

in this case as intervenors because they lack Article III standing, defendants have made no argument that they have not satisfied the requirements of USCIT Rule 24. The granting of permissive intervention is discretionary with the Court. *Manuli Autoadesivi, S.p.A. v. United States*, 9 CIT 24, 26, 602 F. Supp. 96, 98 (1985).

Permissive intervention under USCIT Rule 24(b) requires that an applicant's claim and that of the main action share a common question of law or fact. USCIT Rule 24(b). Here, the facts of the case are necessarily shared by all entities interested in the case. In addition, the respective complaints of the Governments of Canada are, in every material respect, the same as that of CWB. That being the case, the requirements of USCIT Rule 24(b) are satisfied.

As noted, defendants made no argument that the Governments of Canada failed to qualify as permissive intervenors at the time they consented to their intervention. Even now, defendants' only claim is that intervenors must have Article III standing in order to intervene. In other words, defendants appear to concede that the Governments of Canada have met the requirements of 28 U.S.C. § 2631(j)(1) and of USCIT Rule 24(b).

D.
Article III Standing

As far as can be determined, the question of whether independent Article III standing is required for permissive intervenor status under USCIT Rule 24 or for that matter under Fed. R. Civ. P. 24[10] is a question of first impression for the Federal Circuit. *See Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1382 (Fed. Cir. 2001) ("*Landmark*"). As will be seen, the other Circuits are split on this question.

For its part, the United States Supreme Court appears to favor a finding that Article III standing is not required for an intervenor to participate in an action. While no case is directly on point, the Court has addressed questions related to the issue. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("*Diamond*"). In *Diamond*, several physicians challenged the constitutionality of an Illinois abortion statute. *Id.* at 56–57. The State of Illinois defended the statute's constitutionality, and a pediatrician who supported the law filed a motion to intervene on the side of the State. *Id.* at 57. Thereafter, the district court enjoined certain provisions of the Illinois statute and the Court of Appeals for the Seventh Circuit affirmed. *Id.* at 61. The state of Illinois did not file a petition for a writ of certiorari, but the inter-

[10] Because both the Federal Rules of Civil Procedure and the rules of this Court are undergoing drafting revisions, the text of Fed. R. Civ. P. 24 has newly revised language while USCIT Rule 24 retains the old wording. At the time the Governments of Canada made their motions to intervene the rules were, in all material respects, the same.

vening pediatrician did seek to appeal to the Supreme Court. *Id.*

The Court held that, because the State of Illinois did not appeal the circuit court's decision, there was no longer an Article III "case" or "controversy" to be heard. *Id.* at 63–64. In reaching its conclusion, the Court found that intervention, whether permissive or as of right, does not confer a status sufficient to keep a case alive absent an independent showing of Article III standing. *Id.* at 68 ("Although intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.") (citations omitted); *see also id.* at 68, n.21 (noting the split of authority among circuit courts on this issue).

In deciding *Diamond*, the Court explicitly stated that it was not deciding whether those seeking to intervene on the side of a party that has demonstrated Article III standing must show that they too satisfy the case or controversy requirement.

> We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2)[11], but also the requirements of Art. III. To continue this suit in the absence of Illinois, Diamond himself must satisfy the requirements of Art. III. The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now.

See Diamond, 476 U.S. at 68–69. Nonetheless, the Court stated that: "[h]ad the State sought review, . . . [the pediatrician], as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally." *Id.* at 64. In addition, the Court observed that the "ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join." *Id.* at 64. In other words, the Supreme Court appears to accept the idea that, if the party with which it is aligned has demonstrated Article III standing, an intervenor, despite the inability to demonstrate independent Article III standing, may participate in the case.

Likewise, in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972) ("*Trbovich*"), the Supreme Court allowed a plaintiff-intervenor to remain in a case even though his participation as a

[11] This subsection is "Intervention of Right."

plaintiff was barred by statute.[12] Thus, while the intervenor could not independently satisfy the case or controversy requirement, the Court found that he too could "piggyback" on the standing of another so long as the intervention was limited to the claims presented by that party.

i. Federal Circuit Authority

As noted, the only Federal Circuit case that touches on this issue is *Landmark*, 256 F.3d at 1365. In *Landmark*, the Federal Deposit Insurance Corporation ("FDIC") sought to intervene in an action brought against the United States. *Id.* at 1379–80. The trial court granted FDIC's motion to intervene. *Id.* at 1380. On appeal, the Federal Circuit dismissed the FDIC as an intervenor because its claims were unrelated to those of the party on whose side it sought to intervene. *Id.* at 1382.

As to Article III standing, the Court found a lack of a justiciable controversy between the FDIC and defendant the United States because "[H]ere at no time were the FDIC and the United States truly adverse parties." *Landmark*, 256 F. 3d at 1380. As a result, the FDIC could not demonstrate that it had standing under Article III. The Federal Circuit, however, went on to observe:

> The FDIC intervened in this case. Whether an intervening party must satisfy the case-or-controversy requirement independently of the claims brought by the other plaintiffs is an open question. We conclude, however, that because the FDIC's claims are unrelated to those brought by [the plaintiff], it would be improper to permit the FDIC to proceed given the lack of a justiciable controversy with respect to the claims.

Id. (citations omitted). Thus, the Federal Circuit in *Landmark* has left open the possibility that an intervenor need not satisfy the Article III case or controversy requirement so long as its claims are the same as those of a party that has satisfied the test.

ii. Circuits Holding That An Intervening Party Does Not Need To Have Independent Article III Standing

Unlike the Federal Circuit, other Circuits have taken a definitive position on this issue. In *United States Postal Service v. Brennan*,

[12] The Secretary of Labor had instituted the action under 29 U.S.C. § 402(b) of the Labor Management Reporting and Disclosure Act ("LMRDA"). *Trbovich*, 404 U.S. 528 at 529, 531. ("This Court has held that § 403 [of LMRDA] prohibits union members from initiating a private suit to set aside an election."). Thus, the intervenor had no independent standing to sue.

("*Brennan*"), 579 F.2d 188, 190 (2d Cir. 1978), the Second Circuit stated that intervening parties need not establish independent standing, so long as there is a case or controversy within the meaning of Article III between the plaintiff and defendant. *Brennan* involved a challenge to the constitutionality of the Private Express Statutes[13] and applicable Postal Service Regulations. The dispute arose when the United States Postal Service filed an action to permanently enjoin the Brennans from running a mail delivery business. *Id.* The National Association of Letter Carriers ("NALC"), a union representing Postal Service employees, filed a motion to intervene. The district court denied the motion because NALC could not demonstrate Article III standing. *Id.*

On appeal, the Second Circuit affirmed the denial[14] of NALC's motion to intervene but disagreed with the district court on the significance of standing. *Id.* The Court stated that the question of standing was to be considered in the framework of Article III, which restricts judicial power to "cases" and "controversies." *Id.* The Court went on to observe: "[t]he existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor." *Id.* (citations omitted).

In *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) ("Ruiz"), the Fifth Circuit similarly held that Article III does not require intervenors to possess independent standing "where the intervention is into a subsisting and continuing Article III case or controversy . . . ." The *Ruiz* Court reasoned that, once a valid Article III case or controversy is present, a court's jurisdiction vests and the presence of additional parties, although they alone could not independently satisfy the Article III requirements, does not affect the jurisdiction that is already established. *Id.* at 832 (footnote omitted).

Recently, the Tenth Circuit also held that parties seeking to intervene under Rule 24 need not establish Article III standing, "so long as another party with constitutional standing on the same side as the intervenor remains in the case." *San Juan County, Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) (quotation and citation omitted).

The Sixth and Eleventh Circuits have echoed the view that an intervening party need not establish standing under Article III. *See*

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[13] The statutes limited the ability of private parties to compete with the United States mail. *See Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 519 (1991).

[14] The Court of Appeals found that NALC, having intervened as a matter of right under Fed. R. Civ. P. 24(a)(2) failed to demonstrate "any inadequacy of representation." *Brennan*, 579 F.2d at 191.

Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991); *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1336 (11th Cir. 2007).

iii. Circuits Holding That An Intervening Party Must Establish Independent Article III Standing In Order To Intervene In An Action

By way of contrast, the Seventh, Eighth and D.C. Circuits have held that an intervening party must establish Article III standing in addition to meeting Rule 24's intervention requirements. *See Jones v. Prince George's County, Maryland*, 348 F.3d 1014, 1017 (D.C. Cir. 2003) (per curiam) ("Jones"); *Fund for Animals, Inc., v. Norton*, 322 F.3d 728, 731–32 (D.C. Cir. 2003) ("*Fund for Animals*"); *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) ("*Mausolf*"); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996) ("Solid Waste Agency"). In articulating their reasoning, these Circuits have found that intervenors must establish Article III standing because they seek to participate on an equal footing with the original parties to the action. *See, e.g., Mausolf*, 85 F.3d at 1300 ("An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well."); *see also Fund for Animals*, 322 F.3d at 731–732; *Jones*, 348 F.3d at 1017; *Solid Waste Agency*, 101 F.3d at 507.

E.
The Governments of Canada Have Standing as Plaintiff-Intervenors

Plaintiffs' motion asks the court to permit the Governments of Canada to remain in this action as plaintiff-intervenors. *See* Pls.' Reply Mem. 7, 7 n.3. As noted, plaintiffs contend that because they are bringing "precisely the same claims and seek precisely the same relief" as CWB, they need not establish independent Article III standing, and should be allowed to continue in the ongoing litigation as plaintiff-intervenors. Pls.' Mot. 7.

The court finds that the Governments of Canada may participate in the ongoing litigation as permissive plaintiff-intervenors. This conclusion results from the clear indication of the Supreme Court in *Diamond* that this would be the outcome should it address the issue, and from the Federal Circuit decision in *Landmark*, suggesting this as a possible result. In reaching its conclusion the court relies, in particular, on the discussion in *Ruiz*:

> We find the better reasoning in those cases which hold that Article III does not require intervenors to possess standing. These cases recognize that the Article III standing doctrine

> serves primarily to guarantee the existence of a "case" or "controversy" appropriate for judicial determination. . . .
>
> Once a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III's requirements, does not of itself destroy jurisdiction already established.

161 F.3d at 832 (citations and footnote omitted).

In other words, Article III establishes the jurisdictional requirement that the court address cases or controversies. Once that jurisdictional requirement is met, so long as the parties with standing remain in the case, the court's jurisdiction continues regardless of the presence of intervenors. Here, the court has a case or controversy before it brought by CWB against the United States and Commerce. The Governments of Canada have met the requirements of USCIT Rule 24(b) and their claims and prayers for relief are identical to those of CWB on whose side they seek to intervene. No party would be burdened by granting the Governments of Canada plaintiff-intervenor status, nor would the court. Therefore, the Governments of Canada may remain in this case as permissive plaintiff-intervenors despite being unable to demonstrate independent Article III standing.

F.
Remedies

Finally, in *Wheat Board II* the court directed the parties to "consult and jointly submit to the court the form of a judgment comporting with this opinion . . . ." *Wheat Board II*, 32 CIT at __, 580 F. Supp. 2d at 1371. While this instruction has since been modified by a subsequent court order,[15] a dispute has arisen concerning the relief the order should grant. CWB and the Governments of Canada insist that the judgment should "award all of the injunctive and declaratory relief requested by CWB and the Canadian federal and provincial governments as plaintiff-intervenors." Pls.' Mot. 8. Plaintiffs argue that this relief should include a declaration that:

> The Tariff Act of 1930, as amended, requires unliquidated entries to be liquidated in accordance with the final and conclusive results of binational panel review, and 19 U.S.C. § 1516a(g)(5)(B) does not require or permit such entries to be

[15] *Canadian Wheat Board v. United States*, Consol. Ct. No. 07–00058 (Nov. 21, 2008) (order granting defendants' motion for relief from filing a judgment).

> liquidated in accordance with an ITC or Commerce determination finally and conclusively invalidated pursuant to binational panel review.

Pls.' Mot. 8, App. A at 4.

Plaintiffs insist that this remedy is appropriate because "If the judgment does not clearly grant declaratory relief, Defendants may contend that the judgment has no bearing on their conduct in future proceedings, resulting in future attempts to liquidate entries in accordance with AD or CVD determinations invalidated by binational panels." Pls.' Mot. 8. In other words, plaintiffs would have the court grant declaratory relief for use in future disputes in the event a situation arises with facts that are substantially the same as those presented here. The defendants oppose declaratory relief.[16]

The authority to grant a declaratory judgment is found in the Declaratory Judgment Act, (28 U.S.C. § 2201(a)), and the rules of this Court. *See* 28 U.S.C. § 2201(a) ("[A]ny court of the United States, upon the finding of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."); USCIT Rule 57.

The Supreme Court has explained that "[w]hile the courts should not be reluctant" to grant relief in appropriate cases, the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 241, 243 (1952); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants."); *Green v. Mansour*, 474 U.S. 64, 72 (1985).

The court will not exercise its discretion to enter a declaratory judgment. This case concerns the return of deposits now held by the United States government. Plaintiffs will ultimately have a judgment directing the return of their deposits. Plaintiffs have presented nothing to indicate that they have any reasonable belief that they will not receive their money or that they will be injured in the future in the same way by defendants' conduct. In this respect, the facts here can be contrasted with those in *Canadian Lumber Trade Alliance v. United States*, 30 CIT 892, 895, 441 F. Supp. 2d 1259, 1263 (2006),

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[16] The defendants assert that: "The Declaratory Judgment Act prohibits the issuance of declaratory judgments 'in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country.'" Defs.' Resp. Pls.' Mot. Clarification 8 (quoting 28 U.S.C. § 2201(a)). Because the court declines to issue a declaratory judgment it does not address this argument.

where the Court found "that future injury to Plaintiffs from Defendant's conduct is certain." Thus, the court is unable to find that declaratory judgment, having prospective effect, is appropriate here.

Finally, plaintiffs seek injunctive relief, although they make no argument for this remedy in their moving papers. In addition, in their complaints none of the parties ask for mandatory injunctive relief. Because plaintiffs fail to make any argument with respect to their request for an injunction their application for this relief is denied. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief.").

V.
CONCLUSION

For the foregoing reasons, the court denies defendants' motion for reconsideration and grants plaintiffs' motion for reconsideration. The parties are hereby ordered to contact Casey Ann Cheevers, Case Manager, United States Court of International Trade, One Federal Plaza, New York, New York, 10278, within five days of the issuance of this opinion to set the date for a hearing as to the form of judgment.

Dated: September 1, 2009
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op, 09–93

ENI TECHNOLOGY INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Consol. Court No. 05–00170

[Plaintiff's Motion for Summary Judgment is granted in part. Defendant's Motion for Summary Judgment is denied.]

Dated: September 1, 2009

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Robert B. Silverman, Robert F. Seely, Steven P. Florsheim* and *Curtis W. Knauss*) for the Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Aimee Lee*); *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection for the Defendant.

OPINION

Pogue, Judge:

I.
INTRODUCTION

This consolidated action involves the proper classification of merchandise, identified as "radio frequency generators" ("RF Generators" or "merchandise"), imported by Plaintiff ENI Technology Inc. ("ENI"), for use, *inter alia*, in semiconductor manufacturing processes.[1] ENI challenges the United States Customs and Border Protection's ("Customs" or "Government") classification of the merchandise as "static converters," with a 1.5% *ad valorem* duty. ENI claims that its merchandise is properly classified as "machines [used] for processing semiconductor materials," which are duty free.

Before the Court are cross motions for summary judgment pursuant to USCIT Rule 56. The Court has exclusive jurisdiction pursuant to 28 U.S.C. § 1581(a)(2000).[2]

Because ENI's merchandise is principally used as parts of plasma[3] processing systems, which are machines used for semiconductor manufacturing, and because the merchandise does not meet the definition of "static converters," the court grants ENI's motion as to "principal" use. However, because the record, as currently before the court, does not resolve the subsidiary issue of the type of plasma processing in which ENI's imports are used, (*see* Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. & in Supp. of Def.'s Cross-Mot. ("Def.'s Mem."), Ex. A, Pl.'s Resp. to Def.'s First Interrogs. & Req. for Produc. of Docs. ("Interrogs.") at 1–2 ("The semiconductor processing systems include plasma-assisted etch systems, which remove materials ('ETCH'); plasma-assisted chemical vapor deposition systems, which deposit materials from a gaseous source ('CVD'); and plasma-assisted physical vapor deposition systems, which deposit materials

[1] As described by ENI expert Stephen Fairfax, semiconductor manufacturing is:

> the process of taking materials, silicon or other materials, that don't conduct electricity very well and altering their conducting properties in very precise and somewhat complicated ways to produce useful electrical circuits, such as computers or memories.

(Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem."), Ex. 4, Fairfax Dep. at 81.)

[2] 28 U.S.C. § 1581(a)(2000) provides: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515]." Unless otherwise indicated, further citations to Title 28 of the U.S. Code are from the 2000 edition.

[3] *See Illustrated Dictionary of Electronics* 536 (Stan Gibilisco ed., 8th ed., McGraw-Hill 2001) (plasma is "[a] usually high-temperature gas that is so highly ionized that it is electrically conductive and susceptible to magnetic fields").

from a solid source ('PVD')")), the court otherwise denies both motions, directing the parties to address this subsidiary issue.

For ease of reference, the court opinion is organized in accordance with the following ***TABLE OF CONTENTS:***

II.
BACKGROUND

At issue here are three entries[4] of ENI's[5] RF Generators,[6] imported between 2002 and 2004. As noted above, upon liquidation, Customs classified the RF Generators as "static converters" pursuant to the Harmonized Tariff Schedule of the United States ("HTSUS") Subheading 8504.40.95 (2002) and HTSUS Subheading 8504.40.95 (2004).[7] ENI protested the classification, and Customs denied ENI's protest on February 11, 2005, applying HQ 966466 (Oct. 24, 2003), *available at* 2003 WL 23303566. After paying the required duties, charges and exactions on its RF Generators, ENI filed suit here.

In its complaint, ENI asserts that its RF Generators are more properly classified either as machines for the processing of semiconductor materials, under HTSUS 8479.89.84,[8] or physical vapor depo-

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[4] The merchandise, imported through the Port of Buffalo, New York, entered under entry number 336–2732463–8 (entered February 9, 2004, liquidated August 27, 2004), number 336–4092963–6 (entered December 9, 2002, liquidated September 10, 2004) and number 336–4092697–0 (entered November 22, 2002, liquidated September 10, 2004). (Def.'s Mem. 1 n.1.)

[5] ENI is now known as MKS Instruments, Inc. However, for consistency, the court will refer to the importer by its former name. ENI describes itself as a "producer and distributer of instruments, components and subsystems for advanced manufacturing processes," particularly for "semiconductor manufacturing." (Pl.'s Mem. 3.)

[6] "RF" connotes "radio frequency," that is, frequency in the radio spectrum - 10 KHz to 300,000 MHz. *See IEEE 100: The Authoritative Dictionary of IEEE Standards Terms* ("*IEEE 100*") 912, 914 (7th ed. 2000); *Illustrated Dictionary of Electronics*, *supra* note 3, 577, 580. ("Hz," "MHz," and "KHz" stand for hertz, megahertz, kilohertz, which are units of frequency.) The Government refers to the subject machines as "RF Generators"; ENI originally referred to them as such. (*See* Pl.'s Compl. at 1; Pl.'s Mem., Ex. 4, Fairfax Dep. at 43–44.) However, ENI's marketing materials and ENI's more recent filings identify the subject merchandise as "RF plasma generators." (Pl.'s Mem., Ex. 1; Pl.'s Resp. to Def.'s Cross Mot. for Summ. J. ("Pl.'s Resp."), Ex. 2, Stenglein Aff. ¶¶ 4–13; Pl.'s Mem., Ex. 2, Holber Aff. *passim*; Pl.'s Mot. for Summ. J.; Pl.'s Mem., Ex. 3, Fairfax Aff. ¶¶ 15–19.) The Government objects to the latter characterization. The court makes no finding on this issue, but, for the purposes of this opinion, refers to the machines as "RF Generators" consistent with ENI's complaint.

[7] Subheading 8504.40.95 covers:

> Electrical transformers, static converters (for example, rectifiers) and inductors; . . .
> Static converters: . . .
> Other

Machines liquidated under this Subheading are subject to an *ad valorem* duty of 1.5%. Further references to the HTSUS, unless otherwise indicated, are to the 2004 edition, as the relevant HTSUS provisions have remained identical from 2002 through 2004.

[8] Subheading 8479.89.84 extends to:

> Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof [ ]:
>
> Other machines and mechanical appliances [ ]:
>
> Other [ ]:

sition apparatus, under HTSUS 8543.89.10.[9] Accordingly, ENI's complaint requests that the court direct the appropriate Customs officer to re-liquidate the entries, and refund the excess duties collected, with lawful interest.

Following discovery, ENI moved for summary judgment,[10] arguing that its RF Generators should be classified under HTSUS 8479.89.84.[11] The Government has cross-moved for summary judgment, defending the original classification, "static converters," and, in the alternative, proffering HTSUS 8543.89.96 ("Electrical machines and apparatus . . . . Other" — a "basket" provision[12]).

Undisputed Facts

The following undisputed facts are before the court.

I. The RF Generator

The RF Generators are machines that generate power at a fixed radio frequency.[13] They are powered by electricity, *i.e.*, they receive

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Other:

Machines for processing of semiconductor materials; machines for production and assembly of diodes, transistors and similar semiconductor devices and electronic integrated circuits [ ] . . . .

Machines liquidated under this Subheading are free of duty.

[9] Subheading 8543.89.10 covers:

Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:

Other machines and apparatus: . . .

Physical vapor deposition apparatus:

Other:

Machines for processing of semiconductor materials; machines for production of diodes, transistors and similar semiconductor devices and electronic integrated circuits.

Machines liquidated under this Subheading are also free of duty.

[10] ENI supports its motion with an affidavit from William M. Holber, former Senior Director of Advanced Technology at MKS Instruments (formerly ENI); two affidavits from William Steinglein, Director of Product Engineering for MKS Instruments (formerly ENI); two affidavits and a deposition from Stephen A. Fairfax, owner and president of MTechnology, Inc., a consulting engineering firm; and ENI specification sheets and marketing materials.

[11] At oral argument, ENI abandoned its requested alternative classification under HTSUS 8525.10.90.25 ("Transmission apparatus for radiotelephony").

[12] "'Basket' or residual provisions of HTSUS Headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is not a more specifically applicable subheading." *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (quoting *EM Indus., Inc. v. United States*, 22 CIT 156, 165, 999 F. Supp. 1473, 1480 (1998)).

[13] The entries at issue contain five different models from three different product lines of ENI-imported RF Generators. The imported RF Generators include ENI's model number 1B–10013–10 (from its "Spectrum" series, with an output of 10 kW at 13.56 MHz); model

alternating current ("AC")[14] at 60 Hz from the main U.S. electric grid[15] ("mains power"), from which they generate or produce power at radio frequencies. To be exact, the RF Generator creates RF current at 13.56 MHz[16] ranging from 300 to 10,000 watts.[17] It is undisputed that the output of RF Generator is RF current,[18] in other words, alternating current in the radio frequency range, at a certain wattage.[19]

In the process of making RF current, RF Generators convert the AC to direct current ("DC") using a rectifier or similar device.[20] The RF Generator also regulates the DC "to keep the voltage very uniform" in order to "hold the RF power constant." (Pl.'s Mem., Ex. 4, Fairfax Dep. at 60.) Subsequently, the various RF Generator models utilize either a narrow band RF crystal oscillator or a direct digital synthesis

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numbers ACG–6B–01 and ACG–6B–02 (from its "ACG" series, with an output of 600 W at 13.56 MHz); and model numbers GHW12Z13DF2N01 and GHW25A13DF3N01 (from its "GHW" series, with an output of 1.25 kW at 13.56 MHz and 2.5 kW at 13.56 MHz, respectively). (Pl.'s Mem., Ex. 1, at 8, 11–19; Pl.'s Mem. 3 & ns.1–3; Pl.'s Mem., Ex. 4, Fairfax Dep. at 40–42; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶¶ 10–11; Pl.'s Mem., Ex. 3, Fairfax Aff. ¶ 17.) "W" and "kW" stand for watts and kilowatts, respectively, which are units of electric power.

[14] "Alternating current" identifies a current that alternates in direction of flow. *See Concise Encyclopedia of Engineering* 31 (2004); *Illustrated Dictionary of Electronics, supra* note 3, 22; *IEEE 100, supra* note 6, 28. (*See also* Pl.'s Mem., Ex. 4, Fairfax Dep. at 21–22 ("[C]urrent is the flow of charged particles, and alternating current means that the flow of the charge periodically reverses"), 32; Pl.'s Mem., Ex. 3, Fairfax Aff. ¶¶ 4–5.)

[15] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 7; Pl.'s Mem., Ex. 4, Fairfax Dep. at 42.)

[16] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 7; Pl.'s Mem., Ex. 4, Fairfax Dep. at 63; Pl.'s Mem., Ex. 3, Fairfax Aff. ¶ 18(g).) "Factory-set frequencies cannot be reset by purchaser/user." (Pl.'s Mem., Ex. 2, Holber Aff. ¶ 13(c).)

[17] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 8; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 11.)

[18] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 35, 39; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 6.)
The parties generally describe the RF Generator's output as "RF power." "Power" generally indicates "[a]ny form of energy or force available for application to work" or "[m]otive power or heat . . . obtained from an electrical supply." XII *Oxford English Dictionary* 261 (2d ed. 1989). "Radio-frequency power" is defined as "alternating current power at radio frequencies." *Illustrated Dictionary of Electronics*, *supra* note 3, 578. (*See also* Pl.'s Mem., Ex. 3, Fairfax Aff. ¶ 9 ("'AC power' refers to voltage (pressure of flow) x current (mass of flow) at AC frequencies (not over 400 Hz)." (emphasis omitted)); Pl.'s Mem., Ex. 4, Fairfax Dep. at 38 ("RF is for radio frequency. The intent of this generator is to produce power at radio frequencies and to transmit that power to the load.").)

[19] The parties debate whether the "RF current" can technically be considered "AC." However, this disagreement does not create issues of material fact for trial.

[20] (*See* Def.'s Mem., Ex. A, Interrogs. ¶ 4(a); Pl.'s Mem., Ex. 2, Holber Aff. ¶ 12; Pl.'s Mem., Ex. 4, Fairfax Dep. at 42, 47; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 12.)
A "rectifier" is a "nonlinear circuit component that allows more current to flow in one direction than in the other" that is "used primarily for the conversion of alternating current (ac) to direct current (dc)." *Concise Encyclopedia of Engineering, supra* note 14, 602; *see also IEEE 100, supra* note 6, 939 (a "rectifier" is a "converter for conversion from ac [alternating current] to dc [direct current]").

module ("DDS") to generate RF signal.[21] The oscillator or DDS "shape[s] the wave form," that is, it generates the desired 13.56 MHz frequency.[22]

End users purchase RF Generators to obtain "not just the [RF] frequency but [also] . . . hundreds or thousands of watts of power at that frequency." (Pl.'s Mem., Ex. 4, Fairfax Dep. at 64.) To serve this purpose, the RF signal is transferred from the oscillator/DDS through a "variable attenuator" [23] to either an amplifier or an inverter, depending on the model.[24] The variable attenuator, which reduces the amplitude or magnitude of the signal, is used so as to "control the final amount of power that is delivered to the load[[25]]." (Pl.'s Mem., Ex. 4, Fairfax Dep. at 57.)

The amplifier or inverter receives the signal and increases its wattage and current levels to desired specifications.[26] Amplifiers and inverters operate in different ways — the amplifier matches and amplifies an incoming signal,[27] whereas an inverter "converts DC to some form of alternating current" and makes only one type of waveform whose "design is fixed by the inverter" — but both devices perform this "same function" in the RF Generator. (Pl.'s Mem., Ex. 4, Fairfax Dep. at 48, 51.)

In essence, according to ENI's evidence, the AC input at 60 Hz is converted into DC; that DC then facilitates the creation of or is converted into (alternating) RF current.[28] Notably, the RF Generator converts AC to RF in two steps rather than one. (*Id.* at 58–59.) According to Fairfax, RF is created in two steps because to do so is "most practical and most economical." (*Id.*)[29]

Once created, the RF Generator's alternating current at radio frequency 13.56 MHz is transmitted through a 50-ohm coaxial cable.

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[21] (*See id.* at 49–50, 52–53; Pl.'s Mem., Ex. 2, Holber Aff. ¶ 12; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 12(b).)

[22] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 12; Pl.'s Mem., Ex. 4, Fairfax Dep. at 52–53.)

[23] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 56.) Some, though not all, of the models contain a variable attenuator. (*See id.* at 60–61.)

[24] (*See id.* at 45–46, 48–49, 51; Pl.'s Mem., Ex. 2, Holber Aff. ¶ 12.)

[25] "[E]lectrical engineers use the term 'load' to denote the ultimate use of the electric power." (Pl.'s Mem., Ex. 4, Fairfax Dep. at 67–68.)

[26] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 12; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 12(c).)

[27] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 48–49, 56.)

[28] The Government does not agree that the DC "facilitates the creation of" RF current, but contends that the DC "is converted into" RF current. The court need not resolve this disputed factual issue.

[29] The nature of this "conversion" step in the RF Generators' operation is contested, although this factual matter is not germane to the motions before the court.

(Pl.'s Stmt. of Material Facts Not in Issue ("Pl.'s Stmt.") ¶ 9.)[30] It is this output which then has utility within the manufacturing process.

II. The Plasma Processing System

The RF Generator can be used in various types of plasma processing, *e.g.*, production of semiconductor devices and integrated circuits through PVD, CVD and etch plasma processing.[31]

The plasma processing system or "tool" [32] is comprised of a set of room-sized machines, each segregated in its own housing and performing its own function, which together form the plasma processing system.[33] (*See* Def.'s Mem., Ex. A, Interrogs. ¶¶ 2–4.) The RF Generator operates with these machines.[34] (*See id.*)

When used as a part of a plasma processing system, the RF Generator is the only source of RF power to the plasma chamber.[35] As such, RF Generators, in providing RF current at 13.56 MHz, are integral to the plasma processing system.[36] From the RF Generator, the RF output flows through the coaxial cable to a separate machine

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[30] (*See* Pl.'s Mem., Ex. 4, Fairfax Report at 8; Pl.'s Mem., Ex. 2, Holber Aff. ¶¶ 12, 13(b); Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 6; Pl.'s Mem., Ex. 4, Fairfax Dep. at 39.)

[31] (*See* Pl.'s Mem. 8; Def.'s Mem., Ex. A, Interrogs. ¶ 2(a); Pl.'s Mem., Ex. 4, Fairfax Dep. at 82.) ENI has not presented evidence as to what percentage of its RF Generators are used or intended to be used, respectively, in CVD, PVD or plasma etch processing of semiconductors.

[32] A "tool" is "a semiconductor industry term for a particular machine that does some sort of step in the process of making an integrated circuit." (Pl.'s Mem., Ex. 4, Fairfax Dep. at 78.)

[33] (Pl.'s Mem. 7; *id.*, Ex. 4, Fairfax Dep. at 83 ("The plasma chamber is also part of the tool, but the tool itself is usually a very large, very complicated machine that will have a lot of other stuff besides the RF Generator and the plasma chamber.").)

[34] Other machines in the tool include the "plasma chamber, electrostatic chuck, RF matching network, chemical/gas transmission pumps and valves, effluent handling devices, material handlers, and system controller." (Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 5; *see also* Pl.'s Mem., Ex. 1 at 5 (diagram representing the RF Generator as part of the "complete RF delivery subsystem" — including a "serial interface," a "plasma generator," a "matching network," a "plasma probe," and a "plasma chamber"); Pl.'s Mem., Ex. 4, Fairfax Dep. at 72–73.)

[35] (*See* Pl.'s Resp., Ex. 2, Stenglein Aff. at 2.)

[36] (Def.'s Mem., Ex. A, Interrogs. ¶ 5(a); Pl.'s Mem., Ex. 2, Holber Aff. ¶ 9; Pl.'s Mem., Ex. 4, Fairfax Dep. at 132–33.)

called an "impedance[37] matching network" that "matches the output impedance of the RF [G]enerator to that of the plasma processing chamber." [38] The output then flows from the impedance matching network to an antenna located within the sealed plasma chamber containing a gas.[39] The antenna is also not part of the RF Generator.[40] Rather, the antenna receives the RF Generator's output and emits RF electromagnetic waves into the chamber.[41] The waves transform the gas into an ionized gas or "plasma." [42] This plasma, in turn, causes materials to be deposited on or patterns etched into substrate, i.e., silicon "wafers." [43]

III. ENI's Marketing of the RF Generator

ENI has presented evidence that it markets its RF Generators primarily for use in plasma processing or thin film processing systems,[44] including the processing of semiconductors or integrated circuits.[45] ENI does not advertise its products as "static converters." [46] However, ENI's marketing materials, as presented to the court, do mention uses for the RF Generators apart from semiconductor processing, such as other thin film processing applications (*i.e.*, manufacture of flat panel displays, optical media and industrial coatings) and industrial uses.[47]

IV. Use of the RF Generator

Despite the potential for other industrial uses, ENI has presented evidence that its RF Generators are principally used by its consumers

[37] "Impedance" is defined as "[t]he overall opposition to an electric current, arising from the combined effect of resistance R and reactance X and measured by the ratio of the e.m.f. to the resulting current . . . ." VII *Oxford English Dictionary, supra* note 18, 704; *see also Illustrated Dictionary of Electronics, supra* note 3, 356 (impedance is the "total opposition offered by a circuit or device to the flow of alternating current"). "Impedance matching" involves "[t]he insertion of a suitable transformer or network between circuits having different impedances, for the purpose of optimizing power transfer." *Illustrated Dictionary of Electronics, supra* note 3, 356. Thus, an "impedance-matching network" is a "network of discrete components, often adjustable, that is used to match a circuit having a certain impedance to a circuit having a different impedance." *Id.*

[38] (Pl.'s Mem., Ex. 2, Holber Aff. ¶ 10; *see also* Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 6; Pl.'s Mem., Ex. 4, Fairfax Dep. at 57–58.)

[39] (Pl.'s Mem., Ex. 2, Holber Aff. ¶ 10; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶¶ 6–7.)

[40] (Def.'s Stmt. of Undisputed Material Facts ("Def.'s Stmt.") ¶ 11.)

[41] (Pl.'s Stmt. ¶ 9; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 7.)

[42] (Pl.'s Stmt. ¶ 11; Pl.'s Resp., Ex. 1, Fairfax Aff. ¶ 13.)

[43] (Pl.'s Stmt. ¶ 12.)

[44] (*See* Pl.'s Mem., Ex. 4, Fairfax Report at 7 ("[ENI] markets and sells the RF [G]enerators at issue specifically for plasma processing applications."); Pl.'s Mem., Ex. 1 at 3, 4, 8, 9.)

[45] (*See* Pl.'s Mem., Ex. 1 at 4, 8.)

[46] (*See* Pl.'s Resp., Ex. 1, Fairfax Aff. ¶ 14. *See also* Pl.'s Mem., Ex. 1.)

[47] (*See* Pl.'s Mem., Ex. 1 at 4, 8.)

in plasma processing applications.[48] ENI also offers evidence to show that RF Generators are primarily used specifically for plasma processing of semiconductors.[49] One study cited by ENI states that, on average in 2002 through 2004, over 80 percent of RF Generators sold in the United States were used for semiconductor manufacturing. (*See* Pl.'s Mem., Ex. 2 at Ex. B.) According to ENI's proffered evidence, most end users of RF Generators are indeed in the business of manufacturing semiconductors.[50] However, as noted above, ENI's evidence also indicates that the RF Generators are used for other applications aside from semiconductor processing, again, including thin film processing applications to manufacture or package products other than semiconductors.[51]

V. Design of the RF Generator

Moreover, ENI presents evidence that the principal design purpose of its RF Generator is to produce RF current or RF power[52] for plasma processing,[53] and, more specifically, to manufacture semiconductor devices.[54] In support, ENI further notes that this design purpose is reflected in the subject RF Generators' particular characteristics that distinguish them from static converters and other RF Generators.[55] For example, the subject RF Generators:

- comply with specific safety standards of the semiconductor manufacturing industry, namely SEMI Standards F–47 or S2–02000;[56]

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[48] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 43, 70–71, 126; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 5; Pl.'s Mem., Ex. 2, Holber Aff. ¶¶ 10–11.)

[49] (*See, e.g.*, Pl.'s Mem., Ex. 4, Fairfax Report at 4; Pl.'s Mem., Ex. 2, Holber Aff. ¶¶ 10–11, 14.)

[50] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 14; Pl.'s Mem., Ex. 4, Fairfax Report at 6.)

[51] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 78–79.)

[52] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 64–65; Pl.'s Mem., Ex. 2, Holber Aff. ¶ 5; *see also* Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 12(g).)

[53] (Pl.'s Mem., Ex. 4, Fairfax Report at 6.)

[54] (*See* Pl.'s Mem., Ex. 2, Holber Aff. at 2; Pl.'s Mem., Ex. 4, Fairfax Dep. at 18, 64–65, 75.)

[55] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 77; Pl.'s Mem., Ex. 2, Holber Aff. ¶¶ 13, 17; Pl.'s Mem., Ex. 4, Fairfax Report at 8–9.)

[56] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 13(e); Pl.'s Ex. to Pl.'s Resp. to the Court's Questions in its Letter Dated May 13, 2009 ("Pl.'s Resp. to Court") Ex. 1, Stenglein Aff. ¶¶ 8–9.)

- emit output factory-set at 13.56 MHz for use in plasma processing[57] and, more specifically, plasma processing of semiconductors;[58]
- control and monitor this output to keep it constant and uniform;[59]
- are designed to interact with remotely-operated user computers;[60]
- utilize a specified language or protocol;[61]
- are designed to interact with and bolt into the tool;[62]
- can measure "reflected power" [63] (which is particularly a problem when using RF current to stimulate plasma);[64]
- are designed to manage the fluctuating impedance of plasma and work with ENI-manufactured impedance matching networks to protect against reflected power;[65] and
- come with output connectors for 50-ohm-impedance coaxial cables.[66]

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[57] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 13(c); Pl.'s Mem., Ex. 3, Fairfax Aff. ¶ 18(g); Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 11.)

[58] (Def.'s Mem., Ex. A, Interrogs. ¶ 4(a).)

[59] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 76; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 12(g); Pl.'s Mem., Ex. 2, Holber Aff. ¶ 12; Pl.'s Mem., Ex. 3, Fairfax Aff. ¶ 18(f); Def.'s Mem., Ex. A, Interrogs. ¶ 4(a).)

[60] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 13(d); Pl.'s Mem., Ex. 3, Fairfax Aff. ¶ 18(h); Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 12(e).)

[61] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 75–76; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 8(b).)

[62] (*See* Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 8(a); Pl.'s Mem., Ex. 4, Fairfax Dep. at 78.)

[63] "Reflected power," in the context of "a transmission line not perfectly matched to a load at the feed point," is "an expression of the amount of electromagnetic field reflected from the feed point rather than absorbed by the load." *Illustrated Dictionary of Electronics, supra* note 3, 589.

[64] (Pl.'s Mem., Ex. 4, Fairfax Report at 8; Pl.'s Mem., Ex. 4, Fairfax Dep. at 66–67.)

[65] (*See* Pl.'s Mem., Ex. 2, Holber Aff. at ¶¶ 13(f), 16; Pl.'s Mem., Ex. 4, Fairfax Dep. at 77.) However, according to Fairfax, impedance matching networks are generally used with all RF Generators, regardless of whether they are being used to manufacture semiconductors. (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 116–17.)

[66] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 12; Pl.'s Mem., Ex. 3, Fairfax Aff. ¶ 14; Pl.'s Mem., Ex. 4, Fairfax Report at 8; Pl.'s Resp., Ex. 2, Stenglein Aff. ¶ 12(f).)

VI. The RF Generator as Known in the Trade

ENI also presents expert evidence that, in the trade, RF Generators are primarily described with reference to their application in semiconductor and integrated circuit processing.[67] According to ENI's evidence, the RF Generator could be considered a RF "power supply," [68] a "machine," [69] an "electrical machine" [70] or an "electrical appliance." [71] However, ENI's proffered evidence disputes that, in the electrical engineering trade, the RF Generators themselves constitute "conductors," [72] "current regulators," [73] "chemical, vapor or deposition apparatus" [74] or "high tension generators." [75]

ENI also presents evidence that RF Generators are not known in the trade as "alternating current converters [and/or] cycloconverters." [76] Alternating current converters or cycloconverters, according to Fairfax, are viewed by the engineering community as special devices effecting the conversion from alternating current at one frequency to alternating current at another frequency, without the intervening step of direct current conversion.[77] Fairfax further maintains that these machines only involve conversion of alternating current in the "mains" frequency range.[78]

Finally, ENI presents evidence, and the Government agrees, that RF Generators are not known in the electrical engineering industry

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[67] (*See* Pl.'s Mem., Ex. 2, Holber Aff. ¶ 18.)

[68] (Pl.'s Mem., Ex. 4, Fairfax Dep. at 79, 87.) However, the RF Generator is not the only power source of electrical energy to ENI's plasma processing system. (*See id.* at 125–26, 132.)

[69] (*See id.* at 85.)

[70] (*See id.* at 86–87; Def.'s Stmt. ¶ 3.)

[71] (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 86.)

[72] (*See id.* at 40.)

[73] (*Id.* at 91–92.)

[74] (*Id.* at 86.)

[75] (*See id.* at 97.)

[76] (*Id.* at 93.) ENI's expert identifies alternating current converters and cycloconverters as two terms identifying the same machine. (*See id.* at 94; Pl.'s Resp., Ex. 1, Fairfax Aff. ¶ 6.) Fairfax cites electrical engineering authorities. *See IEEE 100, supra* note 6, 265 ("cycloconverter[:] [a] converter using controlled rectifier or transistor devices that has the capability of adjusting the frequency and proportional voltage of the output waveform to provide speed control of motors."); Keith H. Sueker, *Power Electronics Design: A Practitioner's Guide* 220 (Newnes 2005) (cycloconverters "are a special case of motor drives"; "[t]he only serious barrier to the application of cycloconverters is that the output frequency must be less than half of the input frequency to avoid asymmetry of output voltage waveforms.").

[77] (Pl.'s Mem., Ex. 4, Fairfax Dep. at 93–94, 98–99, 109; Pl.'s Resp., Ex. 1, Fairfax Aff. ¶ 6.)

[78] (Pl.'s Resp., Ex. 1, Fairfax Aff. ¶ 8.)

as "static converters." [79] Thus, this particular fact is not at issue here.

III.
STANDARD OF REVIEW

The court's review of Customs' classification decisions is bifurcated. While "[t]he proper scope and meaning of a tariff classification term is a question of law[,] . . . determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact." *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (citations omitted). On questions of law, a Customs' classification decision is subject to de novo review as to the meaning of the tariff provision, pursuant to 28 U.S.C. § 2640, but may be accorded a "respect proportional to its 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In interpreting classification terms contained in the HTSUS, the General Rules of Interpretation ("GRI") to the HTSUS direct the court's *de novo* review. Specifically, GRI 1 states:

> The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions . . . .

This rule "is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, *i.e.*, they are the first consideration in determining classification." 1 World Customs Org., Harmonized Commodity Description & Coding Sys., Explanatory Notes 1 (3d ed. 2002) ("Explanatory Notes").[80] Thus, interpretation of tariff headings, and the court's analysis, originate in the headings, subheadings, section notes and chapter notes of the relevant parts of the HTSUS, in this case, Section XVI including Chapters 84 and 85.

On factual issues, summary judgment is only appropriate "if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is *no genuine issue* as to *any material fact* and that the movant is entitled to judgment as a matter of law." USCIT R.

[79] (*See* Def.'s Reply Mem. to Pl.'s Resp. to Def.'s Cross Mot. ("Def.'s Reply") 6 ("[The Government] do[es] not dispute that the RF Generator is not known in the trade as a static converter."); *see also* Pl.'s Mem., Ex. 4, Fairfax Report at 9–10; Pl.'s Mem., Ex. 3, Fairfax Aff. ¶¶ 8–14; Pl.'s Resp., Ex. 1, Fairfax Aff. ¶¶ 5, 12–14.)

[80] 80 The Explanatory Notes "do not constitute controlling legislative history but nonetheless are intended to clarify the scope of [the] HTSUS [ ] and to offer guidance" in its interpretation. *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (1994).

56(c) (emphasis added). Material issues only arise concerning "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Consequently, in classification cases, genuine issues of material fact only arise when there is a dispute over the use, characteristics, or properties of the merchandise being classified, *see Brother Int'l Corp. v. United States*, 26 CIT 867, 869, 248 F. Supp. 2d 1224, 1226 (2002), or where commercial meaning is in question. *See Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001).

IV.
DISCUSSION

I. The RF Generator as a Heading 8466 "Part" or "Accessory"

ENI's main contention is that its RF Generators are parts of a plasma processing system that manufactures semiconductors and integrated circuits. The controlling section note, HTSUS Section XVI Note 2, instructs that "parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547)[81] are to be classified according to the following rules":

> (a) Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8485, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
>
> (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517;
>
> (c) All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8485 or 8548.

Thus, Note 2(b) establishes that parts are to be classified with the goods with which they are principally used unless such parts have a

[81] Headings 8484 (gaskets), 8544 (insulated wire), 8545 (articles of graphite or other carbon), 8546 (electric insulators) and 8547 (insulating fittings for electrical machines) are inapplicable to the subject merchandise.

particular or respective heading as specified by Note 2(a), *except* for the headings listed in the parentheses in Note 2(a) which are themselves "parts" provisions. These "parts" headings are specifically excluded from the scope of Note 2(a) by the force of the "other than" provision in the parentheses, and thus these parts are not "to be classified in their respective headings," but rather are to be classified, in accordance with 2(b), "with the machines of that kind or heading." All of these "other than" provisions are clearly inapplicable to the subject merchandise, save one – Heading 8466.[82]

Subheading 8466.93.85 covers

> Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465 . . . [:]
>
> Other []: . . .
>
> For machines of headings 8456 to 8461: . . .
>
> Other: . . .
>
> Other: . . .
>
> . . . of machines of subheading 8456.91 [plasma etching systems for "dry etching patterns on semiconductor materials"]; . . . of machines of subheading 8456.99.70 [plasma etching systems for "stripping and cleaning semiconductor wafers"].

As a result, if some or all of the RF Generators imported by ENI are "suitable for use solely or principally" as parts of plasma etching systems falling in Subheadings 8456.91 or 8456.99.70, Section XVI Note 2(b) dictates that the RF Generators are to be classified in Heading 8466 "as appropriate," because Subheading 8466.93.85 includes "parts and accessories suitable for use solely or principally with" plasma etching machines as identified in Heading 8456.[83]

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[82] Headings 8409 (parts of spark-ignition reciprocating or rotary internal combustion piston engines or compression-ignition internal combustion piston engines), 8431 (parts of certain lifting or shoveling machinery), 8448 (auxiliary machinery for certain textile manufacturing machines), 8473 (parts for typewriters, calculators, automatic data processing machines and similar), 8485 ("[m]achinery parts, not containing electrical connectors, insulators, coils, contacts or other electrical features, and not specified or included elsewhere" in chapter 84), 8503 (parts of electric motors, generators or rotary converters), 8522 (parts of certain video or audio recording devices), 8538 (parts of electrical apparatus for switching or protecting electrical circuits and similar) and 8548 ("[w]aste and scrap" of certain cells and batteries) are not involved in this case. Heading 8529, covering, among other things, parts of radio transmission apparatus under Heading 8525, likewise is inapplicable to the subject merchandise.

[83] The Government argues that the court's analysis should be limited to Chapter 85, as the RF Generators are "electrical in nature" and Chapter 84 only contains mechanical items "generally not electrical in nature." (Def.'s Mem. 18–19.) The Government differentiates between "mechanical"and "electrical" machines based upon language from the Chapter 84 Explanatory Notes:

This analysis is not complete, however, because the HTSUS does not define "part" or "accessory." When the HTSUS does not define a tariff term, the term receives its "common and popular meaning." *E.M. Chems. v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). To determine a term's common meaning, a court may consult "dictionaries, scientific authorities, and other reliable information sources." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). Specific definitions of "part" and "accessory" have been used. *See Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352-53 (Fed. Cir. 2002). In *Rollerblade*, the Federal Circuit determined that "dictionary definitions indicate that an 'accessory' must bear a direct relationship to the primary article that it accessorizes." *Id.* at 1352. In other words, the court noted, the "accessory" must directly act on or affect the operation of the accessorized item. *Id.* at 1353.[84] Like-

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> Subject to the provisions of the General Explanatory Note to Section XVI, this Chapter covers all machinery and mechanical appliances, and parts thereof, not more specifically covered by Chapter 85 . . . .
>
> In general, Chapter 84 covers machinery and mechanical apparatus and Chapter 85 electrical goods. However, certain machines are specified in headings of Chapter 85 . . . while Chapter 84 on the other hand covers certain non-mechanical apparatus. . . .
>
> It should also be noted that machinery and apparatus of a kind covered by Chapter 84 remain in this Chapter even if electric . . . .

3 Explanatory Notes 1393. While it is true that Chapter 84 does indeed "in general" cover machinery, the Explanatory Note stops short of dictating that electrical goods always fall in Chapter 85 and never fall into Chapter 84. In fact, the Explanatory Note indicates that there is some overlap in the two categories. Further, the Note is "[s]ubject to" the Section XVI Note 2(b), which, as explained above, instructs that certain parts and accessories "suitable for use solely or principally" with items in Chapter 84 should either be classified with the item or in an "appropriate" Heading for the item's parts and accessories. Finally, while it appears generally that Chapter 84 covers mechanical and Chapter 85 covers electrical goods, GRI 1 again states that "[t]he table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only . . . ."

> The Government further argues that
>
> Chapter 84 covers machines which *operate* by using supplied electrical power/current. But they do not *produce* or *convert* power/current. In other words, a mechanical machine may receive power from a source such as a motor, but this power merely assists in the mechanical functioning of the machine . . . . Chapter 85, on the other hand, covers machines which produce or convert power/current. . . . Here, the RF Generator[s] are classifiable in Chapter 85, and excluded from Chapter 84, because, the functioning of the RF Generator is to "produce RF power."

(Def.'s Resps. to the Court's Questions in its Letter Dated May 13, 2009 11–12 (citations and footnote omitted) (emphasis in original).) The court finds no support for this assertion in the Headings or the Section, Chapter or Explanatory Notes.

As a consequence, the court does not find the Government's arguments persuasive and will not eliminate Chapter 84 from the analysis.

[84] The Explanatory Notes to Heading 8466 similarly describe "accessories" as "subsidiary devices used in connection with machine-tools, such as interchangeable devices which modify the machine-tool so that it can perform a wider range of operations; devices to increase precision; devices which perform a particular service relative to the main function of the machine." 3 Explanatory Notes 1564.

wise, a "part" is "an essential element or constituent; integral portion which can be separated, replaced, etc." *Rollerblade*, 282 F.3d at 1352 (quoting *Webster's New World Dictionary* 984 (3d College Ed. 1988)). Thus, a "part" also "must have a direct relationship to the primary article, rather than to the general activity in which the primary article is used." *Id.* Accordingly, the *Rollerblade* court determined that imported in-line roller skating protective gear did not qualify as a "part" or an "accessory" to roller-skates, because the protective gear did not affect the roller-skates' operation and instead the gear accessorized the "general activity of roller skating." *Id.* at 1352–54.

Unlike roller-skating protective gear, the RF Generators used with plasma etching undisputedly act on and affect the operation of plasma etching systems. Both parties agree that the subject machines provide "RF power," or significant wattage of power at radio-frequency current, to the plasma chambers in order to create RF waves which stimulate the plasma, thereby effecting the plasma etching process. The court also notes that the Explanatory Note to HTSUS Subheading 8456.91 describes ENI's machines by name: "[d]ry etchers generally incorporate one or more reaction chambers, pumps, vacuum pumps, *radio-frequency or microwave generators*, gas-flow control equipment and process control equipment." 3 Explanatory Notes 1543 (emphasis added). It thus appears to the court that, in accordance with Subheading 8466.93.85, RF Generators used with plasma etching systems would qualify as a "part" or "accessory" of such systems, and accordingly be classified therein. (The "principal use" of the imported RF Generators is discussed below in Section V.)[85]

As to the remaining RF Generators, i.e., those not used for plasma etching, Note 2(a) requires additional analysis prior to the application of Notes 2(b). Specifically, because the parentheses exception in Note 2(a) is not applicable to ENI's RF Generators used principally as parts of PVD apparatus or CVD, Note 2(a) instructs that these RF Generators are to be "classified in their respective headings" where such headings exists. It follows that, in accordance with Note 2(a), the court must determine whether these other RF Generators are classifiable "in their respective headings." Although, like many of the Section XVI headings, HTSUS Headings 8543 and 8479 include "parts thereof" within the heading descriptions, this inclusion is "[s]ubject to the general provisions regarding classification of parts," *i.e.*, Section XVI Note 2(a). *See* 4 Explanatory Notes 1701; 3 Explanatory Notes 1597. Thus the Section Note and the Explanatory Notes

[85] ENI has not identified for the court which of the subject machines are used principally with machines for plasma etching of semiconductors. However, as is explained below, the court finds that ENI has presented evidence to show the RF Generators' "principal use" in manufacturing semiconductors and integrated circuits. The court leaves it to the parties to determine which of the RF Generators belong under Subheading 8466.93.85.

require an initial review of other particular headings. Specifically, the Explanatory Notes to Section XVI Note 2 state:

> In general, parts which are suitable for use solely or principally with particular machines or apparatus (including those of heading 84.79 or 85.43), or with a group of machines or apparatus falling in the same heading, are classified in the same heading as those machines or apparatus . . . . The above rules *do not apply* to parts which in themselves constitute an article covered by a heading of this Section . . . ; these are *in all cases* classified in their own appropriate heading *even if specially designed to work as part of a specific machine.* This applies *in particular* to . . . *Electrical transformers and other machines and apparatus of heading 85.04*.

3 Explanatory Notes 1385–86 (emphasis added). The court therefore must determine whether any particular heading in Section XVI applies specifically to these RF Generators themselves. If such headings do not exist, Note 2(b) then instructs that these parts are to be classified in the heading with the particular machine for which they have such a dedicated principal use.

II. Heading 8504 ("Static Converters")

As noted above, it is the Government's position that the RF Generators fall under Heading 8504 as, *eo nomine*, "static converters." Specifically, Subheading 8504.40.95 provides:

> Electrical transformers, static converters (for example, rectifiers) and inductors[86] . . . [:]
>
> Static converters: . . .
>
> Other

ENI claims that the tariff term "static converter" is not broad enough to include RF Generators "by any definition or common usage *in the trade.*" (Pl.'s Mem. 13 (emphasis added).)[87] Furthermore, ENI argues that the RF Generator contains different components and performs different functions than a static converter.

For the reasons explained below, the court declines to apply the broad definition of "static converter" advocated by the Government, and instead holds that, in accordance with the *IEEE 100* definition

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[86] No party claims that RF Generators may be classified as "Electrical transformers" or "inductors."

[87] The Government agrees with ENI on this point that the RF Generator is not known in the trade as a static converter. (Def.'s Reply 6, 7–8.) However, the Government argues, as explained below, that the Explanatory Notes nevertheless demonstrate a Congressional intent to have a broader definition of "static converter" than that proffered by ENI as known in the electrical engineering industry.

and the Explanatory Notes, HTSUS Heading 8504 "static converters" does not extend to machines that produce fixed-frequency alternating current to fixed-frequency alternating current of another frequency via conversion to direct current.

A.
Common Meaning of "Static Converter"

As explained above, "[w]hen a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is presumed to be its common meaning in the absence of evidence to the contrary." *Timber Prods. Co. v. United States*, 515 F.3d 1213, 1219 (Fed. Cir. 2008) (citing *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984)). The HTSUS does not define the term "static converter," and therefore, once again, the court turns to "dictionaries, scientific authorities, and other reliable information sources." *Warner-Lambert Co.*, 407 F.3d at 1209.

No standard dictionaries define the term "static converter," but one authoritative technical dictionary,[88] *IEEE 100*, defines static converter as "[a] unit that employs solid state devices[89] such as semiconductor rectifiers or controlled rectifiers (thyristors), gated power transistors, electron tubes, or magnetic amplifiers to change ac power to dc power, dc power to ac power, or fixed frequency ac power[90] to variable frequency ac power.[91]" *IEEE 100, supra* note 6, 1103. Because the *IEEE 100* definition provides a discrete list of devices identified by function, the canon of statutory construction "*expressio unius est exclusio alterius*" — the expression of one thing is the exclusion of another — applies. *See Nissan Motor Mfg. Corp. v. United States*, 884 F.2d 1375, 1377 (Fed. Cir. 1989). Thus, "static converter" excludes machines with functions not listed in the *IEEE 100* definition, for example, machines that convert fixed-frequency alternating current to fixed-frequency alternating current of another frequency.

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[88] The Federal Circuit has affirmed this Court's use of scientific and technical dictionaries to determine the common meaning of technical terms. *See Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1049–50 (Fed. Cir. 2001).

[89] Devices are "solid state" if they are "[b]ased on or consisting chiefly or exclusively of semiconducting materials, components, and related devices." *American Heritage Dictionary of the English Language* 1715 (3d ed. 1996). *Accord XV Oxford English Dictionary, supra* note 18, 974 ("utilizing the electronic properties of solids (as in transistors and other semiconductor devices, in contrast to the partial vacuum of valves)"); *Illustrated Dictionary of Electronics, supra* note 3, 641 ("[p]ertaining to devices and circuits in which the flow of charge carriers (electrons and holes) is controlled in specially prepared blocks, wafers, rods, or disks of solid materials. Semiconductor devices, such as transistors and integrated circuits, are solid-state components").

[90] "Fixed frequency" connotes alternating current "preset to operate on one frequency." *See Illustrated Dictionary of Electronics, supra* note 3, 286.

[91] "Variable frequency" current is "adjustable" by the user. *See* Michael F. Hordeski, *New Technologies for Energy Efficiency* 136 (2003).

B.
Explanatory Notes for HTSUS Heading 8504

In contrast to the Government's arguments, the Explanatory Notes for HTSUS Heading 8504 further limit rather than expand the reach of the term "static converter." The relevant portions read:

> (II) ELECTRICAL STATIC CONVERTERS
>
> The apparatus of this group are used to convert electrical energy in order to adapt it for further use. They incorporate converting elements (e.g., valves) of different types. They may also incorporate various auxiliary devices (e.g., transformers, induction coils, resistors, command regulators, etc.). Their operation is based on the principle that the converting elements act alternately as conductors and non-conductors.
>
> The fact that these apparatus often incorporate auxiliary circuits to regulate the voltage of the emerging current does not affect their classification in this group, nor does the fact that they are sometimes referred to as voltage or current regulators.
>
> This group includes:
>
> (A) Rectifiers by which alternating current (single or polyphase) is converted to direct current, generally accompanied by a voltage change.
>
> (B) Inverters by which direct current is converted to alternating current.
>
> (C) Alternating current converters and cycle converters by which alternating current (single or polyphase) is converted to a different frequency or voltage.
>
> (D) Direct current converters by which direct current is converted to a different voltage.

4 Explanatory Notes 1626 (emphasis omitted).

Relying on the first sentence of these Explanatory Notes, the Government defends its classification of the RF Generator as a "static converter" that is an "apparatus . . . used to convert electrical energy in order to adapt it for further use." *Id.* ENI takes issue with this broad definition, as "this sentence is so general that it 'describes any apparatus that uses electric power in any form.'" (Pl.'s Mem. 15 (quoting *id.*, Ex. 4 Fairfax Dep. at 88–89).)

The court agrees with ENI that reliance on such a broad definition could be over-inclusive; the issue, however, is resolved by sections (A) through (D). Because the Explanatory Notes use the word "includes," established case law requires application of the doctrine of "*expressio unius est exclusio alterius*" to limit the broad definition to the four enumerated examples (A) - (D). *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1367 (Fed. Cir. 1998) (interpreting the

phrase "including brushes constituting parts of machines, appliance or vehicles" to limit the definition of "brush" in Heading 9603 to cover only brushes that are part of a machine, appliance or vehicle); *see also Cummins Inc. v. United States*, 29 CIT 525, 533-34, 377 F. Supp. 2d 1365, 1373 (2005), *aff'd*, 454 F.3d 1361 (Fed. Cir. 2006).[92]

In accordance with *Bausch & Lomb* and *Cummins*, to give HTSUS Heading 8504 meaning, the word "includes" must qualify the broader definition of "static converter." As a consequence, in order for a machine to fit the "static converter" rubric, said machine must be a (A) rectifier,[93] (B) inverter,[94] (C) alternating current converter/cycle converter or (D) direct current converter.[95]

Because the RF Generator accepts input of alternating current at a mains frequency and subsequently generates current in radio frequencies, the Government argues that the RF Generator "meets the term of an 'alternating current converter' as defined by the relevant Explanatory Note." (Def.'s Mem. 14.) However, ENI disagrees, arguing that "alternating current converters" or "cyclo converters" have circumscribed technical definitions. (Pl.'s Mem. 16 (quoting *id.*, Ex. 4, Fairfax Dep. at 93–94 ("[w]hat's in C, alternating current converter and cycle converters [*i.e.*, types of 'static converters'], those are terms of art [to 'power engineers']. They refer to a specific kind of a machine where AC of one frequency is converted to AC of another frequency with no DC in between.")).)

The court again agrees with ENI. A "cycle converter" is also known as a "cycloconverter." *See, e.g.*, S.K. Bhattacharya, *et al., Industrial Electronics and Control* 250 (1995). Although definitions for "cycle converter" are scarce, locatable definitions for "cycloconverter" all

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[92] At oral argument, the Government relied, in part, on the Federal Circuit opinion in *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed Cir. 1997) ("Although the examples in the Explanatory Notes are probative and sometimes illuminating, we will not employ their limiting characteristics to narrow the language of the classification heading itself."). Here, however, unlike *Midwest of Cannon Falls*, the court is not narrowing the language of the classification heading, but is applying the common definition of that language; the Explanatory Notes support that definition.

[93] A rectifier is a device that converts alternating current to direct current. *See supra* note 20.

[94] An "inverter" is a "machine, device or system that changes direct-current power to alternating-current power." *IEEE 100, supra* note 6, 588.

[95] A "direct current converter" is a "converter for changing dc power at a given voltage to dc power at a higher or lower voltage." *IEEE 100, supra* note 6, 312.

identify cycloconverters as machines that *directly* convert[96] alternating current to alternating current of another frequency, usually lower,[97] for use particularly in combination with motors.[98]

Definitions for the term "alternating current converter" are similarly difficult to locate. According to Fairfax, the terms "alternating current converter," "cycle converter" and "cycloconverter" are all synonymous. (*See* Pl.'s Mem., Ex. 4, Fairfax Dep. at 94.) News articles and other available publications primarily refer to "alternating current converters" for use to convert direct current power to alternating current power.[99] Older publications equate alternating current

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[96] *See The Electrical Engineering Handbook: Electronics, Power Electronics, Optoelectronics, Microwaves, Electromagnetics, and Radar* 9–11 (Richard C. Dorf ed., 3d ed., 2006) ("Cycloconverters are direct ac-to-ac frequency changers. The term *direct conversion* means that the energy does not appear in any form other than the ac input or ac output. The output frequency is lower than the input frequency and is generally an integral multiple of the input frequency.") (emphasis in original); Bhattacharya, *supra*, 250 ("A cycloconverter [or] cycle converter[ ] is a device which directly converts one level of cycle rate (*i.e.*, frequency) into another level without using any intermedia[te] d.c. link. In other words . . . a cycloconverter changes a.c. of one frequency into a.c. of another frequency. . . . These converters are basically meant for producing low frequency a.c. voltage.").

[97] *See McGraw-Hill Dictionary of Scientific and Technical Terms* 535 (6th ed. 2003) (a cycloconverter is "[a] device that produces an alternating current of constant or precisely controllable frequency from variable-frequency alternating-current input, with the output frequency usually one-third or less of the input frequency"); *accord Academic Press Dictionary of Science and Technology* 573 (Christopher Morris ed. 1992); *Dictionary of Electrical and Computer Engineering* 133 (2003); Rudolf F. Graf, *Modern Dictionary of Electronics* 134 (4th ed. 1972).

[98] *See IEEE 100, supra* note 3, 265 (a cycloconverter is "[a] converter using controlled rectifier or transistor devices that has the capability of adjusting the frequency and proportional voltage of the output waveform to provide speed control of motors"); *Webster's Third New International Dictionary of the English Language - Unabridged* 564 (2002) ("an electronic device for controlling the speed of a synchronous motor by supplying it with alternating current of grid-controlled frequency"); Sueker, *supra* note 76, 220 (cycloconverters "are a special case of motor drives, since they can also be used in fixed-frequency applications and can supply high overload currents for protective relay coordination in large installations. They are currently used to convert 60 to 25 Hz for the catenary system of Amtrak in the New York to Boston corridor. Another use is for ship propulsion . . . . They convert a fixed generator frequency to a variable frequency for the propeller synchronous motors.").

[99] *See, e.g.*, *EDP Renováveis prices near the bottom, Euroweek*, June 6, 2008, *available at* LEXIS (last visited Aug. 28, 2009) (SMA Solar "is the world's biggest maker of alternating-current converters, which are used to convert the direct current power generated through wind and solar power plants into alternating current for general use"). *See also Kyocera Solar Modules Installed on European Court of Justice, Journal of Technology & Science*, May 31, 2009, at 1720, *available at* LEXIS (last visited Aug. 28, 2009) (identifying a Kyocera module, that converts solar energy in direct current form into alternating current for use in the mains grid, as an "alternating current converter"); *German solar technology company SMA eyes IPO –report, Thomson Financial News Super Focus*, Mar. 26, 2008, *available at* LEXIS (last visited Aug. 28, 2009); *Brunsbuettel nuclear plant to halt briefly, no date, Reuters News*, Sept. 7, 2006, *available at* LEXIS (last visited Aug. 28, 2009).

converters to rectifiers, that is, devices that convert alternating current to direct current.[100]

Any possible factual inconsistency in these definitions aside, the Government has not provided the court with any contrary definitions of these terms, nor has it offered the court any evidence to dispute ENI's expert's assertions that (1) "alternating current converters" are synonymous with "cycle converters" and (2) both terms have a technical meaning that would exclude machines that convert alternating current to direct current and back again.

While the Explanatory Notes do instruct that alternating current converters convert "alternating current (single or polyphase) . . . to a different frequency or voltage," 4 Explanatory Notes 1626, the history and context of the Explanatory Notes counsel in favor of a limited reading of this language. Specifically, the predecessor to the World Customs Organization Harmonized Commodity Description and Coding System Explanatory Notes, the Explanatory Notes to the Brussels Nomenclature, delineate "static converters, rectifiers and rectifying apparatus" to "include" apparatus based on mercury arc rectifiers, diode rectifiers metal and crystal rectifiers, electrolytic rectifiers, battery chargers, high tension generators, vibrating contact rectifiers and converters and synchronous mechanical contact rectifiers. 3 Customs Co-Operation Council, Explanatory Notes to the Brussels Nomenclature 1396–98 (2d ed. 1966); 3 Customs Co-Operation Council, Explanatory Notes to the Brussels Nomenclature 927–28 (1955). Noticeably present in these Notes is the term "static converter" but noticeably absent are any machines remotely resembling a machine that converts alternating current to direct current to a higher frequency alternating current.

The Government cites to *NEC Electronics, Inc. v. United States*, 21 CIT 327 (1997), *aff'd*, 144 F.3d 788 (Fed Cir. 1998), which would, according to the Government, support the use of a broad definition contained in Explanatory Notes over the use of a more limited common commercial usage, the former being more persuasive evidence of

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[100] *See, e.g.*, Albert L. Clough, *A Dictionary of Automobile Terms* 251 (Horseless Age Co. 1913) (listing "alternating current converter" as a synonym of "rectifier"); *Charging Vehicle Batteries from Alternating Mains*, *Horseless Age*, May 16, 1906, at 690 (identifying an "alternating current converter" as a device which creates direct current from alternating current from the mains in order to charge automobile batteries); George Cutter, *The Continuous Current, Limited vs. The Alternating Current, Unlimited, The Electrical Engineer*, July 1888, at 309–11 (identifying "alternating current converter" as a device to convert alternating current from the mains into direct current for use with household and industrial devices).

The court has located one publication that equates the term "alternating current converter" with the term "AC–AC converter" in reference to switched mode power supplies. *See Semiconductors: Technical Information, Technologies and Characteristic Data* 134 (2d ed. 2004). However, the reference does not conflict with the more narrow use of "alternating current converter" found by the court, and thus does not alter the court's conclusion.

legislative intent. *NEC* held that the meaning of a tariff term may be "broader in scope than its commercial usage." *NEC*, 21 CIT at 331. Thus, the Government argues that "this Court may rely upon the Explanatory Notes to find the RF Generator in this case to be classified under heading 8504, even if the commercial and scientific communities are of a different view." (Def.'s Mem. 16.)

However, as explained above, the categories (A) through (D) limit the broad definition provided by the Explanatory Notes. In addition, the language and context of the Explanatory Notes, as well as the common usage of terms therein, do not support the broad categorization of "static converter" advocated by the Government. As such, the court holds that the term "static converter" in Heading 8504 does not include machines that convert fixed-frequency alternating current to fixed-frequency alternating current at a higher frequency via conversion to direct current.

III. Headings 8479 and 8543

A direct comparison of Headings 8479 and 8543, applying GRI 1, also does not resolve this dispute. These two headings are nearly identical, the only difference being that Heading 8479[101] applies to "Machines" while Heading 8543[102] covers "Electrical machines." But any common definition of "Electrical machine" is not sufficient to provide a clear indication of the appropriate placement of RF Generators. This is because the common meaning of "electrical," in the context of word combinations such as "electrical machine," is having electricity as the "controlling power," V *Oxford English Dictionary*, supra note 18, 118, 120; it is clear that both chapters 84 and 85 include machines powered, and thereby controlled, by electricity. Moreover, both headings include machines and apparatus "having individual functions, not specified or included elsewhere in this chapter." Machines for processing semiconductor materials are "specified or included" elsewhere in both chapters, specifically in Subheading 8479.89.84 and Subheading 8543.89.10, as discussed below, as well as in Subheading 8466.93.85, as discussed above.

The Government objects to the use of Subheading 8479.89.84 insisting that, even if the RF Generator does not fit within Heading 8504, the RF Generator, by itself, cannot be considered a machine

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[101] Heading 8479 covers:

Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof [ ] . . . . applies to

[102] Heading 8543 covers:

Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof [ ] . . . .

that processes semiconductors; the RF Generator may only be considered a part of such a system.[103]

However, ENI responds, and the court agrees, that the tariff provision at issue, referencing "machines for processing of" semiconductors or integrated circuits, does not necessarily require that the subject merchandise "in and of themselves" be capable of manufacturing semiconductors or integrated circuits. The Section XVI Notes indicate that "parts" of machines for processing semiconductors are included within the Heading. *See* HTSUS Section XVI Note 2(b). As previously noted, the RF Generator qualifies as a "part" of a plasma processing system.[104]

Furthermore, the Government's reading of Subheading 8479.89.84 conflicts with its stance on plasma chambers and would read out of Heading 8479 plasma chambers for processing semiconductors through chemical vapor deposition, which the Government has argued fall under Subheading 8479.89.84. As ENI notes, plasma chambers "in and of themselves" cannot process semiconductors or integrated circuits without the radio frequency power provided by the RF Generator. The Government's argument on this point is therefore artificial at best and the court declines to adopt it.

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[103] The Government analogizes the RF Generator to an electric motor incorporated into a grinding machine:

> The motor itself does not perform any grinding operation. It merely provides the power which enables the machine to grind the material. The motor alone would not be classified as a grinding machine. By analogy, while the RF Generator provides power to the system which manufactures semiconductor devices, alone, it cannot do it and would not be considered a machine for the processing of semiconductor materials.

(Def.'s Mem. 21 n.10.)

[104] ENI further argues that "the history and development of heading 8479 demonstrates that the [subject merchandise] belong to a class or kind of merchandise correctly classified in that provision." (Pl.'s Mem. 13). In support, ENI references the consolidation of semiconductor production devices into Heading 8486. Effective 2007, note 2 to HTSUS chapter 84 was amended from

> a machine or appliance which answers to a description in one or more of the headings 8401 to 8424 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group and not the latter.

to

> a machine or appliance which answers to a description in one or more of the headings 8401 to 8424, or heading 8486 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group or under heading 8486, as the case may be, and not the latter group.

See Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1988, USITC Pub. 3898, Annex 1 ¶ 272 (Dec. 2006), *available at* http://www.usitc.gov/tariff_affairs/hts_documents/pub3898.pdf (last visited Aug. 28, 2009). The Government responds that Heading 8486 is irrelevant, as it postdates this litigation. As the court has read Heading 8479 to include "parts," it need not address this issue.

IV. Classification of the RF Generators

The court now turns to the proper classification of the RF Generators. As noted above, whether the subject imports properly fall within the scope of the possible headings is a question of fact. *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1328 (Fed. Cir. 2009) (citation omitted). "Because Customs' classification decisions are presumed correct, [ENI] bears the burden of proving otherwise." *Id.* (citation omitted). On these factual issues, both parties maintain that there is no issue of material fact remaining for trial and that this court may decide this case on the record before it.

The court addresses the application of each proffered subheading in turn.

A.
Subheading 8504.40.95

For the reasons explained above, the court must deny summary judgment to the Government as to Heading 8504. It is undisputed that the RF Generators convert its input, i.e., alternating current at mains frequency, into direct current, and then convert the direct current into alternating current with a factory preset frequency of 13.56 MHz. The scope of Heading 8504 excludes machines with the RF Generators' particular function, that is, to convert fixed-frequency alternating current to fixed-frequency alternating current at another frequency via direct current. As a consequence, the RF Generators are not properly classifiable under HTSUS Heading 8504.

B.
Subheading 8479.89.84

As noted above, ENI argues specifically that the proper designation for its RF Generators is "[m]achines for processing of semiconductor materials" in HTSUS Subheading 8479.89.84. ENI argues that its RF Generators are properly classified under HTSUS Subheading 8479.89.84 because they are "principally" used as "machines for processing semiconductor of materials," "machines for [the] production of . . . electronic integrated circuits" and "chemical vapor deposition (CVD) apparatus." (Compl. ¶¶ 6-10; Pl.'s Mem. 13, 18–23.) ENI maintains that it has presented evidence to show that its merchandise satisfies all the factors listed in *United States v. Carborundum Co.*, demonstrating that the merchandise falls in the same "class or kind" of merchandise used to process semiconductors. 63 CCPA 98, 102, C.A.D. 1172, 536 F.2d 373, 377 (1976) ("Factors which have been considered by courts to be pertinent in determining whether imported merchandise falls within a particular class or kind include the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which

the merchandise moves, the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, [and] the recognition in the trade of this use. Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling.") (internal citations omitted).

The *Carborundum* analysis, in this case, is supported by application of HTSUS Additional U.S. Rule of Interpretation ("ARI") 1 ("In the absence of special language or context which otherwise requires — (a) 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 goods of that class or kind to which the imported goods belong, and the controlling use is the principal use"), and HTSUS Chapter 84 Note 7 ("A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose."). As explained in HTSUS ARI 1, an item's use is determined by the "class or kind to which the imported good[ ] belong[s]," and the "principal" use controls. HTSUS ARI 1. An item's "principal use" is "the use 'which exceeds any other single use' of the article." *Outer Circle Prods. v. United States*, __ CIT __, __, 602 F. Supp. 2d 1294, 1307 (2009)) (quoting *Lenox Collections v. United States*, 20 CIT 194, 196 (1996)). *See also Pillsbury Co. v. United States*, 431 F.3d 1377, 1380 (Fed. Cir. 2005) ("Merchandise must be classified 'in the condition in which it is imported.'" (quoting *United States v. Citroen*, 223 U.S. 407, 415 (1912))).

Following the factors enunciated in *Carborundum*, 63 CCPA at 102, 536 F.2d at 377, *Carborundum*'s progeny, ARI 1 and Chapter 84 Note 7, the subject RF Generators fall within a "class or kind" of merchandise whose "principal use" is to process semiconductors through plasma etching, chemical vapor deposition or physical vapor deposition. In support of its motion, ENI has presented undisputed evidence that the end-users of the vast majority of its RF Generators operate these devices with machines that process semiconductors and integrated circuits. ENI has also proffered undisputed evidence, including both affidavits and expert testimony, that the subject machines are designed and used to operate with semiconductor-industry specific safety standards to provide power in the manner required for such a purpose. Such evidence, if unrebutted by the Government, is sufficient to support a summary judgment motion under USCIT R. 56. *See A.D. Sutton & Sons v. United States* , No. 03–00510, 2008 WL 2751236, at *4–5, 2008 Ct. Intl. Trade LEXIS 76, at *14–17 (CIT July 16, 2008).

But despite extensive time for discovery, the Government has presented this court with scant rebuttal evidence. Although the Government has cited evidence that ENI advertises its RF Generators for other uses besides plasma processing of semiconductors, this one fact alone is insufficient to raise an issue of material fact for trial as to "principal use." Furthermore, the Government's insistence that RF Generators can be used for plasma processing applications other than production of semiconductors is unavailing, as this assertion does not, itself, rebut ENI's evidence that the RF Generators are "principally" used for semiconductor-specific plasma processing applications. Therefore, drawing all factual inferences in favor of the Government, *see Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982), the court must grant ENI summary judgment on the issue of principal use.

The court, however, does not wholly grant ENI's motion for summary judgment as to Subheading 8479.89.84. As the court explained above, RF Generators imported for principal use with plasma etching devices, for processing of semiconductors, belong under Subheading 8466.93.85. *See supra*. Also, because Subheading 8543.90.10 is more specific than Subheading 8479.89.84, RF Generators imported for principal use with physical vapor deposition apparatus for processing of semiconductors fall in Subheading 8543.90.10, rather than Subheading 8479.89.84. *See* GRI 6 ("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. . . ."), 3(a)("The heading which provides the most specific description shall be preferred to headings providing a more general description. . . ."). Because there is no more specific subheading, RF Generators imported for principal use with chemical vapor deposition apparatus for semiconductor processing should be categorized under Subheading 8479.89.84.

Furthermore, RF Generators imported for principal use in plasma processing of semiconductors, without specific indication as to their use in CVD, PVD, or plasma etching, fall under Subheading 8479.89.84, as there is no more specific subheading for these RF Generators.

Finally, merchandise imported under all three of the aforementioned Subheadings enters the U.S. free of duty. Accordingly, the court directs the parties to confer in order to determine the appropriate

subheadings for the various imports of ENI's RF Generators,[105] and to prepare an appropriate judgment reflecting those subheadings.

V.
CONCLUSION

Upon consideration of ENI's motion for summary judgment and the Government's cross-motion for summary judgment, the court hereby:

- DENIES the Government's cross-motion for summary judgment in its entirety.
- GRANTS ENI's motion for summary judgment as to "principal use" of the RF Generators as machines for processing semiconductors through plasma etching, physical vapor deposition or chemical vapor deposition, *see*HTSUS Subheading 8543.89.10 (PVD), HTSUS Subheading 8479.89.84 (CVD), and HTSUS Subheading 8456.99.70 (plasma etching), but otherwise DENIES ENI's motion.

The parties' proposed judgment shall be submitted by November 30, 2009.

It is SO ORDERED.

Dated: September 1, 2009
New York, New York

/*s*/
DONALD C. POGUE, JUDGE

Slip Op. 09–94

MAY FOOD MANUFACTURING doing business as MRS. MAY'S NATURALS, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 06–00329

[Plaintiff's motion for reconsideration and to amend judgment denied.]

Dated: September 1, 2009

Peter S. Herrick, P.A. (*Peter S. Herrick*) for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jason M. Kenner, Gardner B. Miller*, and *Mikki Cottet*); *Beth Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendant.

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[105] As the court finds that the merchandise is properly classified under Subheadings 8479.89.84, 8466.93.85 and 8543.90.10, it denies summary judgment as to the Government's claim for classification under the more general basket Subheading 8543.89.96. *See* GRI 3(a), 6.

OPINION

Restani, Chief Judge:

I.
INTRODUCTION

Plaintiff May Food Manufacturing doing business as Mrs. May's Naturals ("Mrs. May's") moves for reconsideration of, and to amend the judgment in, the court's decision in *May Food Manufacturing v. United States*, 616 F. Supp. 2d 1349 (CIT 2009), pursuant to USCIT Rule 59(a) and (e). In that decision, the court granted defendant the United States's motion for summary judgment, concluding that the United States Bureau of Customs and Border Protection properly classified Almond Crunch, a snack called almond brittle consisting of almonds, rice malt, sugar, as prepared almonds under subheading 2008.19.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), and denied a cross-motion for summary judgment based on the claim by Mrs. May's that Almond Crunch was an article returned to the United States after being exported for alterations under subheading 9802.00.50, HTSUS. *Id.*Mrs. May's now asks the court to determine that the correct classification of Almond Crunch is subheading 0802.12.00, HTSUS. (Pl.'s Mem. of Law in Supp. of Mot. for Recons. ("Pl.'s Recons. Br.") 3–7.)

A motion for reconsideration will be granted "only in limited circumstances," such as for "1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case." *Target Stores v. United States*, 471 F. Supp. 2d 1344, 1347 (CIT 2007). The grant or denial of a motion for reconsideration is within the discretion of the court. *Id.* A motion for reconsideration will not be granted "merely to give a losing party another chance to re-litigate the case."*Totes-Isotoner Corp. v. United States*, 580 F. Supp. 2d 1371, 1374 (CIT 2008) (internal quotation marks and citation omitted).

Mrs. May's asserts that "it was so focused on the issue of whether or not an alteration took place in China that it made an unavoidable mistake in considering an alternative classification for the Almond Crunch." (Pl.'s Recons. Br. 3.) This assertion suggests that Mrs. May's did not raise the claim for one of two reasons: either Mrs. May's did not research all HTSUS provisions relating to almonds before filing its complaint or summary judgment briefs, or Mrs. May's strategically chose not to pursue an alternative argument that Almond Crunch is classifiable under heading 0802. Neither reason is a proper ground for reconsideration. *See United States v. Matthews*, 580 F.

Supp. 2d 1347, 1349 (CIT 2008) ("[A]rguments raised for the first time on rehearing are not properly before the court for consideration when prior opportunity existed . . . for the moving party to have adequately made its position known.") (internal quotation marks and citation omitted).

Mrs. May's next argues that the court erred in failing to determine the correct classification of Almond Crunch. (Pl.'s Recons. Br. 3–7.) This argument lacks merit, as the court concluded that heading 2008, HTSUS, which applies to "nuts, . . . otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter . . . not elsewhere specified or included," "is the *only* tariff provision that describes the nature of Almond Crunch." [1] *May Food*, 616 F. Supp. 2d at 1351–52 (emphasis added). The court did not suggest that heading 0802, HTSUS, which applies to "nuts, fresh or dried, whether or not shelled or peeled," could apply to the imported product Almond Crunch.[2] Heading 2008 accurately describes Almond Crunch, and heading 0802 does not. Further, the Explanatory Notes state that Chapter 8 applies to nuts that are at most provisionally preserved or contain small quantities of sugar and excludes nuts that are otherwise prepared or preserved, which are classifiable under Chapter 20. The court therefore correctly concluded that subheading 2008.19.40, HTSUS, is the proper classification for Almond Crunch.

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[1] The relevant portion of Chapter 20 of the HTSUS reads:

2008	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:
	Nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together:
. . . .	
2008.19	Other, including mixtures:
. . . .	
2008.19.40	Almonds . . . .

[2] The relevant portion of Chapter 8 of the HTSUS reads:

0802	Other nuts, fresh or dried, whether or not shelled or peeled:
	Almonds:
. . . .	
0802.12.00	Shelled . . . .

For the foregoing reasons, the plaintiff's motion for reconsideration and to amend the judgment is denied.

Dated: this 1st day of September, 2009.
New York, New York.

/s/ *Jane A. Restani*

JANE A. RESTANI
Chief Judge