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Trade Adjustment Assistance at the U.S. Court of International Trade: The Year in Review, 41 Geo. J. Int'l L. 137 (2009)

Steven D. Schwinn
John Marshall Law School, schwinn@uic.edu

TRADE ADJUSTMENT ASSISTANCE AT THE U.S. COURT OF INTERNATIONAL TRADE: THE YEAR IN REVIEW

STEVEN D. SCHWINN*

I. INTRODUCTION

Trade adjustment assistance (TAA) programs provide a vital safety net for U.S. workers and farmers impacted by the global economy. The labor program, TAA for Workers, administered by the U.S. Department of Labor, provides cash benefits, employment services, and job retraining for workers who lost their jobs because of increased imports or off-shoring.[1] The agriculture program, TAA for Farmers, administered by the U.S. Department of Agriculture, provides cash benefits and technical assistance to farmers and fishermen whose income declined because of an increase in imports.[2]

The U.S. Court of International Trade has jurisdiction to review agency denials of TAA,[3] providing workers and farmers with an important judicial check on agency decision-making in this critical program. This article reviews the court's TAA cases in 2008.

The article first reviews the court's cases involving TAA for Workers, focusing only on the court's substantive rulings. (The court issued no dispositive procedural rulings in 2008 on the TAA for Workers program.) Next, the article reviews the court's cases involving TAA for Farmers, with attention to both substantive rulings and procedural rulings. Finally, the article reviews the court's cases on the government's processes of evaluating TAA applications and defending appeals.

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* Associate Professor of Law, John Marshall Law School, Chicago. Professor Schwinn provides *pro bono* representation for TAA claimants before the U.S. Court of International Trade and previously supervised a student clinic before the court at the University of Maryland School of Law. I would like to thank the editorial staff at the Georgetown Journal of International Law for their outstanding editorial work on this piece.

1. 19 U.S.C.A. §§ 2271, 2295–98 (West 2009); *see also* U.S. Department of Labor, Employment & Training Administration, Trade Act Program: Trade Adjustment Assistance for Workers, http://www.doleta.gov/tradeact/ (last visited Sept. 10, 2009).

2. 19 U.S.C. §§ 2401-2401g (2006); *see also* U.S Department of Agriculture, Foreign Agricultural Service: Trade Adjustment Assistance for Farmers Program, http://www.fas.usda.gov/itp/taa/taa.asp (last visited Sept. 11, 2009).

3. 19 U.S.C.A. § 2395(a) (West 2009).

On one hand, the court in 2008 was characteristically critical of agency decision-making and directive in remanding cases for further consideration. On the other hand, the court did not hesitate to dismiss cases or affirm denials of TAA when applicants failed to proffer sufficient evidence to support their claim. The cases thus provide lessons for both the government and plaintiffs in litigating TAA cases at the court; the article endeavors to highlight these and, when helpful, put them within a broader jurisprudential context.

One final introductory note: earlier this year Congress passed, and President Obama signed, sweeping changes to the TAA programs.[4] The amendments addressed some of the long-standing policy critiques of the programs—most prominently the lack of coverage of service-sector workers—and clarified and simplified many of the technical aspects of the statutes that had created a great deal of confusion among applicants and the Departments. The amendments abrogate much of the court's work in 2008. The court's specific holdings will likely have limited utility for future cases under the amendments, but, as the article addresses throughout, many of the broader principles animating the court's 2008 cases should apply equally well when the court hears cases under the amended programs.

II. TAA FOR WORKERS

The labor TAA program authorizes adjustment assistance for workers who lost their jobs because of increased imports or because of shifts of production to sites outside the United States.[5] With regard to increased imports, a group of separated workers from a firm qualified if their former employer's sales or production decreased absolutely while imports of "articles" that were "like or directly competitive with" articles produced or sold by the firm increased, and that increase "contributed importantly" to the firm's declining sales or production and to the employees' separation.[6] In the typical case, displaced workers would qualify if increased imports of like articles drove down the price or demand for articles that they produced, resulting in their separation. As for off-shore production shifts, a group of separated workers from a

4. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 1800-04, 1861-67, 1871-73, 1881-87, 1891-93, 123 Stat. 115, 367–73, 400–22.

5. *See generally* 19 U.S.C.A. § 2272(a) (West 2009).

6. 19 U.S.C.A. § 2272(a)(2)(A) (West 2009). This section was amended temporarily by Pub. L. No. 111-5, §§ 1801(b), (c), (e)(2), 123 Stat. 367, 370, 371 (2009), but these core components remain.

firm qualified if the firm shifted production outside the United States of "articles like or directly competitive" with the firm's articles, and there was likely to be an increase in imports of "articles that are like or directly competitive" with the firm's articles.[7]

The court in 2008 ruled on the meaning of "contributed importantly," the meaning of "like articles," and the meaning of "article" under the act. The court's ruling on the meaning of "contributed importantly" is the court's most significant ruling on the labor program and, for reasons discussed below in Section A, opens an important line of argument for separated workers seeking TAA and imposes significant corresponding obligations on the Department in investigating claims. The 2009 amendments to the act retain this requirement that increased imports "contributed importantly" to the firm's declining sales or production and to the employees' separation,[8] and therefore this case will continue to be important.

The court's ruling on the meaning of articles "like or directly competitive with" domestic articles, discussed below in section B, is notable, but breaks little new ground. The 2009 amendments use "like articles," so this case will continue to be relevant.

In contrast to these first two cases, the court's ruling on the meaning of "article"—that an "article" cannot be a service, thus excluding service-sector employees from coverage—has been abrogated by a watershed change in the 2009 amendments: service-sector employees are now specifically covered by the act.[9] I nevertheless discuss this case below in Section C.

A. *"Contributed Importantly"*

The court in *Chen v. Chao* ruled that the Department of Labor failed to adequately investigate whether an increase in imports of circuit boards "contributed importantly" to the decline in the sales or production of the employees' former employer, Advanced Electronics, Inc. (AEI), and ultimately to their severance from AEI.[10] The displaced

7. 19 U.S.C.A. § 2272(a)(2)(B) (West 2009). This section was also amended temporarily by Pub. L. 111-5, §§ 1801(b), (c), (e)(2), 123 Stat. 367, 370, 371 (2009). The change will likely make it easier for workers to qualify under this section, because they only need to establish that their production was off-shored, not that the shift will likely lead to greater imports.

8. 19 U.S.C.A. § 2272(a)(2)(A)(iii) (West 2009).

9. *See generally* 19 U.S.C.A. § 2272(a) (West 2009) (including the provision of services under the Act).

10. 19 U.S.C. § 2272(a)(2)(A) (West 2009); *see* Chen v. Chao, 587 F. Supp. 2d 1292, 1298–99 (Ct. Int'l Trade 2008).

workers in *Chen* argued that AEI's declining sales to one of its foreign customers contributed significantly to its overall declining sales during the period under investigation—that its declining sales to its foreign customer represented a higher percentage of its total sales decline than declines in sales to any other single customer.[11] According to the plaintiffs, declining sales to the foreign customer might have meant that the foreign customer found a new American supplier—one that imported circuit boards (like AEI's circuit boards), processed them, and exported them to the foreign customer.[12] The court explained:

> As plaintiffs have suggested, an investigation that included inquiries to the foreign customer could have revealed that the foreign customer stopped purchasing printed circuit boards from [AEI] and began purchasing products from another American supplier (or suppliers). A new supplier possibly could have begun supplying the foreign customer by importing boards like [AEI's] circuit boards. For example, a new supplier could have conducted minor packaging, processing, or testing operations at a domestic facility, in preparation of exportation of foreign-origin circuit boards to the foreign customer . . . .
>
> Plaintiffs are alleging, in essence, that imports into the United States, after re-exportation, could have displaced the printed circuit boards [that AEI] previously supplied to the foreign customer.[13]

The workers' claim was speculative and involved an intervening agent: a hypothetical new American supplier *could have* cut into AEI's business by processing imported circuit boards and exporting them to AEI's foreign customer; thus increased imports of circuit boards *could have* contributed to increased production by the hypothetical intervening supplier, which, in turn, could have contributed to AEI's lost sales to the foreign customer. (More typically, a firm's production would drop because of direct competition with imports. The workers' claim in *Chen* added an intervening supplier.)

The Department rejected the claim without even seriously investigating it. Instead, the Department merely asked former AEI officials whether AEI shipped printed circuit boards abroad or only domesti-

11. *Chen*, 587 F. Supp. 2d at 1297–98.

12. *Id.* at 1299.

13. *Id.* at 1299, 1301 (citations to the record omitted).

cally.[14] Based on its inquiries, the Department concluded that AEI "did not send printed circuit boards to a domestic facility of the foreign customer"—a finding that simply did not address the workers' claim that increased imports contributed substantially to AEI's declining sales to the foreign customer by way of a hypothetical new American supplier.[15]

The court ruled the Department's investigation inadequate and rejected the Department's legal arguments. First, the court rejected the Department's argument, presented for the first time to the court, that the phrase "contributed importantly" did not include the workers' speculative and indirect claim. Quoting the statute, the court wrote that the phrase "contributed importantly" only meant "a cause which is important but not necessarily more important than any other cause."[16] The phrase was certainly capacious enough to include the workers' claim that increased imports contributed to their separation by way of a hypothetical intervening American supplier, and the Department therefore had an obligation to investigate it.[17]

Second, the court rejected the Department's argument based on *Estate of Finkel v. Donovan.*[18] In *Finkel,* the Department declined to investigate the workers' claims that the company's losses resulted from domestic customers that switched to other, lower cost domestic suppliers (which lowered their prices to compete with imports) and from the company's inability to attract new customers due to increased imports.[19] The court nevertheless upheld the Department's investigation, writing that the workers' proffered causes were "indirect effects" on the workers' separation and that therefore the proffered causes did not contribute importantly to the separation.[20] In *Chen,* the Department used *Finkel* to argue that some causes are so remote and indirect that they do not "contribute[] importantly" to the company's loss of sales

14. *Id.* at 1298–99.

15. *Id.* at 1299.

16. *Id.* (citations in the original omitted).

17. *See id.* at 1301. The court also faulted the Department for failing to "explicate . . . its interpretation of the term 'contributed importantly'" and for presenting its argument for the first time at the court. *Id.* at 1300 ("The court must review an agency's determination based on the reasons the agency set forth in that determination, not upon *post hoc* rationalizations of agency actions.")

18. *Id.* at 1300–01 (citing Estate of Finkel v. Donovan, 614 F. Supp. 1245, 1251–52 (Ct. Int'l Trade 1985)).

19. *Estate of Finkel,* 614 F. Supp. at 1251–52.

20. *Id.*

and to the workers' separation.[21]

The *Chen* court distinguished *Finkel* and rejected this argument. According to the *Chen* court, the "indirect effects" in *Finkel* were simply not analogous to the workers' claim in *Chen*.[22] According to the workers' claims in *Finkel*, the company did not directly compete with imports; instead, the secondary, indirect effects of imports resulted in the company's losses and the workers' severance. Imports themselves played no role in the company's losses; instead, the competitor's behavior in response to imports caused the company's losses. In contrast, in *Chen*, AEI might have lost sales as a direct result of imports, even if the loss may have been immediately caused by an intervening American company, and not, as in a more typical case, a foreign exporter. Having dispensed with the Department's arguments, the *Chen* court ruled that the Department had an obligation to investigate the workers' claim that a hypothetical American supplier might have imported circuit boards, processed them, and exported them to AEI's foreign customer, thus contributing importantly to AEI's declining sales and the workers' separation.[23] The court issued the kind of detailed remand instructions that have come to characterize its frustrations with the Department's inadequate investigations.[24]

Chen thus opens an important argument for workers and imposes a significant corresponding obligation on the Department. *Chen* invites workers to claim that imports contributed importantly to their company's losses and their own severance using speculation and hypotheticals. The only limit on such claims is defined by *Finkel*: the workers must claim that their company competed with imports one way or another and that imports did not merely trigger behavior by competitors (which in turn resulted in their own company's losses). Upon receipt of such claims, the Department has an obligation to investigate them. *Chen* teaches that the Department's failure to investigate will result in a remand from the court.

Because the 2009 amendments retain the requirement that imports "contributed importantly" to a company's losses and workers' separation, *Chen* will continue to be a significant case, offering workers an important claim and setting a high bar for Department investigations.

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21. *Chen*, 587 F. Supp. 2d at 1300.
22. *Id.*
23. *Id.* at 1302.
24. *Id.*

B. *"Like or Directly Competitive With"*

Similarly, the court's only 2008 ruling on imports that are "like or directly competitive with" domestic articles will retain its vitality under the 2009 amendments. The court in *Former Employees of Fairchild v. U.S. Secretary of Labor* ruled that the Department of Labor misapplied its regulatory definition of "like or directly competitive" articles in denying benefits to former employees of a semiconductor manufacturer. In *Fairchild*, the Department apparently denied certification based on a company official's statement that the company shipped domestically manufactured semiconductors overseas for further processing and re-importation to the United States.[25] The Department concluded that the processed semiconductors (the "semiconductor devices") were not like the original semiconductors (the "semiconductor wafers"):

> While semiconductor wafers are a component part of semiconductor devices, they are not substantially identical in inherent or intrinsic characteristics. Further, because semiconductor wafers are a component part of semiconductor devices, they are not substantially equivalent to each other for commercial purposes. In addition, the semiconductor wafer has to be further processed before it can be used as a component part of the semiconductor device.[26]

The Department thus concluded that the imported semiconductors were not "like or directly competitive with" the company's semiconductors and denied the TAA benefits.

The court rejected the Department's conclusion. The court wrote that the Department's own regulations defined an imported article as "directly competitive with" a domestic article "at an earlier or later stage of processing . . . if the importation of the article has an economic effect on producers of the domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article."[27] And in investigating whether the foreign-processed semiconductor was "directly competitive with" the domestic-produced semicon-

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25. Former Employees of Fairchild Semi-Conductor Corp. v. U.S. Sec'y of Labor, No. 06-00215, 2008 WL 1765519, at *3–4 (Ct. Int'l Trade Apr. 18, 2008).

26. *Id.* at *4 (quoting Notice of Negative Determination On Remand, 72 Fed. Reg. 24,613, 24,620 (May 3, 2007)).

27. *Fairchild Semi-Conductor Corp.*, No. 06-00215, 2008 WL 1765519, at *4 (quoting 29 C.F.R. § 90.2 (2007)).

ductor, the Department relied on conflicting and indeterminate evidence.[28] The court therefore remanded the case to the Department.[29] Following remand, the Department concluded that the employees qualified for TAA, and the court affirmed.[30]

Fairchild breaks no new ground, but it reaffirms, once again, the court's unwavering commitment to holding the Department to its own regulations and a reasonable standard of investigation. The case adds to a long line of cases supporting this principle, and it will retain its full vitality under the 2009 amendments.

C. *"Articles"*

Finally, and in contrast to the cases discussed above, the court's only 2008 case on "articles" is now defunct under a watershed change in the 2009 amendments that extended the TAA program to service-sector employees. The court in *Former Employees of Mortgage Guarantee Insurance Corp. v. U.S. Secretary of Labor*[31] ruled that former data entry and validation employees offered a service, and did not produce an "article," despite their claim that they processed Notices of Loan Approval (NOLA) forms reflecting their former employer's decision on loan applications.[32] The court distinguished *Former Employees of Merrill Corp. v. United States*[33] and *Former Employees of Electronic Data Systems Corp. v. U.S. Secretary of Labor*[34]—cases involving document *production* of one sort or another—and ruled that "the NOLAs completed by Plaintiffs were existing forms that were filled in by the employees, and were not printed materials comparable to the books, brochures, and other printing industry products listed under chapter 49 [of the Harmonized Tariff Schedule of the United States]."[35] Even if the plaintiffs produced the NOLAs, such production, incidental to an otherwise service-sector job, would not qualify the workers for TAA.[36]

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28. *Id.*

29. *Id.* at *5.

30. Former Employees of Fairchild Semi-Conductor Corp. v. U.S. Sec'y of Labor, No. 06-00215, 2008 WL 2968599, at *1 (Ct. Int'l Trade Aug. 4, 2008).

31. Former Employees of Mortgage Guaranty v. U.S. Sec'y of Labor, 572 F. Supp. 2d 1348 (Ct. Int'l Trade 2008).

32. *Id.* at 1352.

33. Former Employees of Merrill Corp. v. United States, 387 F. Supp. 2d 1336 (Ct. Int'l Trade 2005).

34. Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor, 350 F. Supp. 2d 1282 (Ct. Int'l Trade 2004).

35. *Mortgage Guaranty*, 572 F. Supp. 2d at 1352.

36. *Id.* at 1352–53.

The 2009 amendments to the Act abrogated this case and ended the entire controversy over service-sector employees by specifically covering service-sector employees under the Act.[37] Service-sector employees now qualify for TAA under the same standards as their manufacturing-sector counterparts.

Of the court's 2008 cases on the substantive provisions of TAA for workers, *Chen* is the most significant, offering an important claim for plaintiffs and setting a high bar for Department investigations in determining whether imports "contributed importantly" to a company's declines and workers' severance. *Fairchild,* on the definition of "like or directly competitive" articles, adds to a long line of cases in which the court holds the Department to its own regulations and to a reasonable standard of investigation. Both *Chen* and *Fairchild* retain their full vitality under the 2009 amendments. *Mortgage Guaranty,* in contrast, is abrogated by the amendments, and now service-sector employees qualify for TAA for workers under the same standards as production employees.

III. TAA FOR FARMERS

TAA for farmers involves a two-step process for determining qualification for cash benefits. First, a group of producers qualified for a certification of eligibility if the national average price for their commodity was less than eighty percent of the national average price over the previous five marketing years, and if increased imports of like or directly competitive articles contributed importantly to that price decline.[38] Next, the Department determines whether individual producers within the group qualify for benefits based on whether the producer's "net farm income" declined over two comparison years.[39]

The court did not rule in 2008 on the first step, but it issued both substantive rulings and procedural rulings on the second step. The 2009 amendments substantially changed the substantive requirements under the second step and therefore much of the court's work on these particular issues is now moot. But as discussed more fully below, the broader principles in play in these cases will undoubtedly continue to animate the court's rulings.

This section first examines the court's substantive rulings on the

37. *See generally* 19 U.S.C.A. § 2272(a) (West 2009) (including providers of "services" alongside producers of "articles" in the program qualifying standards).

38. 19 U.S.C. § 2401a(c) (2006).

39. 19 U.S.C. § 2401e(a)(1) (2006).

agriculture TAA program and then examines the court's procedural rulings on the program.

A. *Substantive Rulings*

The court in 2008 ruled only in two particular, but very important and controversial, areas: how the Department calculated "net farm income" and whether the Department was required to use a consecutive year comparison in determining whether an individual producer's net farm income declined. As to the Department's determination of "net farm income," discussed below in Subsection 1, the court ruled that the Department must consider any relevant evidence or argument proffered by an applicant, and not just rely upon the applicant's tax returns. As to the proper year comparison, discussed below in Subsection 2, the court ruled that the Department must compare consecutive years.

As important as these cases were, the 2009 amendments substantially clarified and simplified the second step and abrogated a good deal of the court's work on it. Thus under the revised Act, the Department does not determine "net farm income"; instead, it looks for a decline in the production quantity, a decline in the commodity price, or a decline in the "county level price" maintained by the Department.[40] Under the revised Act, there is no question that the Department must compare consecutive years.[41] The cases discussed below have continuing importance and vitality, however, and they illustrate the kind of meaningful scrutiny that the court applies to the Department's investigations and conclusions. While the 2009 amendments render these particular issues moot, the court's forceful and unwavering approach easily translates to the new issues that will inevitably arise under the revised Act.

1. "Net Farm Income"

In *Dorsey v. U.S. Secretary of Agriculture*,[42] the court ruled that the Department must consider the potential distorting effect of extraordinary, one-time expenses on a producer's net income. In *Dorsey*, the plaintiffs, a small grape vineyard, purchased a wind machine in the first of the two comparison years.[43] Under a special provision of the IRS code,

40. 19 U.S.C § 2401e(a)(1)(A)(ii) (2006).

41. *See id.*

42. Dorsey v. U.S. Sec'y of Agric. (*Dorsey I*), No. 06-00449, 2008 WL 205214 (Ct. Int'l Trade Jan. 25, 2008).

43. *Id.* at *2.

they deducted the full expense of the wind machine in the first year (rather than depreciating the machine over several years), significantly deflating their net income for that tax year.[44] As a result, their net income in the second year appeared greater than their net income in the first year.[45]

The plaintiffs argued that their net income in fact would have declined without the one-time deduction for the wind machine, and that the Department had an obligation to calculate net income without the extraordinary deduction—in effect, that the Department had an obligation to look beyond a single line on the plaintiffs' federal tax return in determining net income and to consider other material going to the producer's net income.[46] The plaintiffs submitted evidence from their accountant to support this claim.[47] The Department countered that the plaintiffs took advantage of the special IRS deduction for federal tax purposes, and that they could not now disavow that election in order to qualify for TAA—that they could not have their cake and eat it too—and that the Department adequately determined the plaintiffs' net income by reference merely to the "net income" line on their federal tax returns.[48]

The court sided with the plaintiffs[49] and later affirmed its reasoning twice—first on the Department's motion for reconsideration[50] and again on the Department's results on remand.[51] The court ruled that the Department failed to consider the plaintiffs' claim, supported by their accountant's letter, that their extraordinary, one-time deduction for a wind machine artificially lowered their net income in the earlier year.[52] The court wrote that two earlier cases, *Viet Do v. U.S. Secretary of Agriculture*[53] and *Selivanoff v. U.S. Secretary of Agriculture*,[54] suggested that the Department has an obligation to exclude extraordinary or unusual

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44. *Id.*

45. *Id.*

46. *Id.* at *3.

47. *Id.* at *2.

48. *Id.* at *3.

49. *Id.* at *4.

50. Dorsey v. U.S. Sec'y of Agric. (*Dorsey II*), No. 06-00449, 2008 WL 728882 (Ct. Int'l Trade Mar. 19, 2008).

51. Dorsey v. U.S. Sec'y of Agric. (*Dorsey III*), No. 06-00449, 2009 WL 22878, at *1 (Ct. Int'l Trade Jan. 5, 2009).

52. *Dorsey I*, 2008 WL 205214, at *4.

53. Viet Do v. U.S. Sec'y of Agric., 427 F. Supp. 2d 1224 (Ct. Int'l Trade 2006).

54. Selivanoff v. U.S. Sec'y of Agric., No. 05-00374, 2006 WL 1026430 (Ct. Int'l Trade Apr. 18, 2006).

expenses or gains when determining a producer's net income[55] and, importantly, that this conclusion was also "tacitly approved" by the Federal Circuit in its defining case, *Steen v. United States*.[56]

The 2009 amendments abrogate *Dorsey*, insofar as the revised Act does not require the Department to determine net farm income. But *Dorsey*'s broader principle—that the Department must look beyond the easy, but often misleading, documentation like tax returns and consider all relevant evidence proffered by the applicant—may apply when the court hears future challenges to the Department's determinations under the new standards.

2. Comparison Years

In companion cases *T.W.R., Inc. v. U.S. Secretary of Agriculture*[57] and *Dus & Derrick, Inc. v. U.S. Secretary of Agriculture*,[58] the court affirmed its earlier ruling[59] that the Department must compare consecutive years in determining whether the producers' net income declined. The Department originally denied benefits in both cases in part because the producers' net income apparently increased between non-consecutive years.[60] The Department's regulations applied in such a way that the Department would compare non-consecutive years for certain applicants for re-certification, including the producers in these cases.[61] The regulations produced this surprising result only in the special case of applications for recertification more than one year after the original application.

The plaintiffs argued, and the court agreed, that the Department's regulations, as applied to these special cases, ran afoul of the statute, which required that the Department compare net income in "the most recent year" to net income in "the latest year in which no adjustment assistance was received" by the producer.[62]

The 2009 amendments abrogate these cases: the new Act simply does

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55. *Dorsey I*, 2008 WL 205214, at *4.

56. *Id.* (citing Steen v. United States, 468 F.3d 1357 (Fed. Cir. 2006)).

57. T.W.R., Inc. v. U.S. Sec'y of Agric., No. 05-00356, 2008 WL 2191774 (Ct. Int'l Trade May 28, 2008).

58. Dus & Derrick, Inc. v. U.S. Sec'y of Agric., No. 05-00346, 2008 WL 318311 (Ct. Int'l Trade Feb. 6, 2008).

59. Dus & Derrick, Inc. v. U.S. Sec'y of Agric., 469 F. Supp. 2d 1326, 1335 (Ct. Int'l Trade 2007).

60. *T.W.R., Inc.*, 2008 WL 2191774, at *2; *Dus & Derrick, Inc.*, 2008 WL 318311, at *2.

61. *T.W.R., Inc.*, 2008 WL 2191774, at *2; *Dus & Derrick, Inc.*, 2008 WL 318311, at *1.

62. *T.W.R., Inc.*, 2008 WL 2191774, at *4 (citing 19 U.S.C. § 2401e(a)(1)(C) (2006)).

not require the Department to determine a producer's net income, and it significantly clarifies the relevant comparison years. But, like *Dorsey*, these cases also stand for broader principles—that the Department must comply with the statute and with its regulations, even in special cases. While the specific issue in these cases is moot, the broader principles will have a continuing vitality even under the 2009 amendments.

B. *Procedural Rulings*

The court issued three procedural rulings in TAA agriculture cases in 2008 addressing separately the statute of limitations, a motion to dismiss for failure to state a claim, and a failure to prosecute. This section takes them one at a time.

The cases are not particularly notable, except for the level of support and tolerance the court offered to plaintiffs prior to dismissing an action, particularly in *SV Block II v. U.S. Secretary of Agriculture*,[63] the case dealing with the plaintiff's failure to prosecute. *SV Block II* also offers a cautionary note to court-appointed counsel, discussed in Subsection 3 below. The 2009 amendments do not affect these rulings, and these cases remain good law.

1. Statute of Limitations

In *Conlin Greenhouses v. U.S. Secretary of Agriculture*, the court dismissed the plaintiff's complaint, because the plaintiff filed with the court more than sixty days from the date of the Department's letter denying benefits.[64] The court rejected the plaintiff's argument that the Department failed to raise a statute of limitations defense in its answer, holding that the statute of limitations is jurisdictional in nature, that it cannot be waived, and that it therefore can be raised at any time.[65]

2. Failure to State a Claim

In *Den Hoed v. U.S. Secretary of Agriculture*,[66] the court upheld the Department's denial of benefits and granted the Department's motion

63. SV Block II v. U.S. Sec'y of Agric., No. 06-00455, 2008 WL 190044 (Ct. Int'l Trade Jan. 23, 2008).

64. Conlin Greenhouses v. U.S. Sec'y of Agric., No. 06-00441, 2008 WL 2104739, at *2 (Ct. Int'l Trade May 20, 2008); *see* 19 U.S.C.A. § 2395(a) (West 2009).

65. *Conlin Greenhouses*, 2008 WL 2104739, at *3.

66. Hoed v. U.S. Sec'y of Agric., 533 F. Supp. 2d 1354 (Ct. Int'l Trade 2008).

to dismiss because the plaintiffs failed to plead that net farm income decreased over the two-year period. The plaintiffs argued that the Department failed to conduct an adequate investigation and wrongly relied only on the plaintiffs' tax returns.[67] The court rejected these arguments, finding that the plaintiffs' completed application contained nothing to suggest that net income decreased. Because the plaintiffs failed to include material in their application showing how their net income declined, and because they failed to allege a decline in their complaint to the court, the court affirmed the Department's denial and dismissed the case.[68]

3. Failure to Prosecute

Finally, in *SV Block II v. U.S. Secretary of Agriculture*, the court dismissed the plaintiff's complaint for failure to prosecute.[69] The plaintiff in this case first filed the case on December 15, 2006.[70] After two letters from the clerk's office—one including forms for court-appointed counsel—and one show cause order, the plaintiff failed to respond, and the court granted the Department's motion to dismiss on January 23, 2008.[71]

Plaintiffs' attorneys should pay attention to one government motion in *SV Block II*, even if the central ruling in the case is relatively unimportant and uncontroversial. Shortly after the plaintiff filed the complaint, the government moved to recapture the case to replace the plaintiff's name with the corporate name, SV Block II, the same name on the original application.[72] But the government has taken the position in other cases that corporate plaintiffs are not entitled to *in forma pauperis* status and court-appointed counsel, even though under court rules corporations must appear through counsel. The effect of the government's position is to require small businesses to obtain counsel on their own—a potential problem for poor businesses in this specialized area of practice. The problem is not insurmountable, however. Court-appointed counsel should simply withdraw their appearance and re-enter as private, *pro bono* counsel.

The cases dealing with the agriculture TAA program are thus mixed. The substantive rulings are quite significant under the prior act, but

67. *Id.* at 1354.
68. *Id.* at 1359.
69. *SV Block II*, 2008 WL 190044.
70. *Id.* at *1.
71. *Id.* at *1–*2.
72. *Id.* at *1.

the 2009 amendments rendered their particular holdings moot. Their enduring value is only in their larger principles. In contrast, the procedural rulings are not particularly notable, but they retain their full vitality under the 2009 amendments.

IV. OVERSIGHT OF GOVERNMENT LITIGATION AND REVIEW OF AGENCY DECISIONS

Finally, this Section reviews the court's rulings as they relate to government litigation tactics and the sufficiency of agency decisions. The court in 2008 exhibited characteristically aggressive positions with regard to Department behavior in investigating applications, issuing decisions, and litigating cases in both the labor and agriculture programs. The court in the cases discussed below curbed government misbehavior at the agency level (in failing to conduct adequate investigations or issue well supported decisions) and in litigation (in misleading the plaintiffs and in misleading the court). These cases outline the boundaries of acceptable Department behavior while offering plaintiffs plenty of fodder for challenging Department decision-making and Department litigation strategies.

The court's decisions on these issues fall into two categories: the government's litigation tactics, and the Departments' investigations and conclusions. This section starts with the former category, primarily because of the particularly appalling government behavior in a single case.

A. *Government Litigation Tactics*

The court's strongest rebuke to the government in 2008 came not against the Department of Labor but rather against its counsel, the Department of Justice. In *Former Employees of BMC Software v. U.S. Secretary of Labor,* the court highlighted the government counsel's questionable lawyering practices in its denial of the Department's motion to reconsider three highly critical footnotes in the court's earlier opinion and order awarding attorneys' fees and expenses to the plaintiffs under the Equal Access to Justice Act.[73]

In the first footnote (footnote 50 in the earlier case) the court referenced a government attorney's promise to the plaintiffs to award full benefits if the plaintiffs were certified.[74] The government attorney

73. BMC Software v. U.S. Sec'y of Labor, No. 04-00229, 2008 WL 4386874 (Ct. Int'l Trade Sept. 26, 2008).

74. *Id.* at *3–*5.

made this promise in exchange for the plaintiffs' consent to the Department's lengthy requested extension of time to file its remand results.[75] But while the Department certified the plaintiffs on remand, it did not include any language reflecting the attorney's promise.[76] The plaintiffs moved the court to order full benefits pursuant to the attorney's promise, but the government refused to amend the remand results and argued that the court lacked jurisdiction to order full benefits.[77] The plaintiffs ultimately received full benefits, but the court, highly critical of the government's actions, wrote in footnote 50 that it was "[not] ultimately necessary to consider the need for sanctions, contempt proceedings, or other action against the Government or its counsel."[78]

In rejecting the government's motion to reconsider the footnote, the court wrote that the issue was not the government's position that the court lacked jurisdiction to order full benefits; rather the issue was the government's "arguably duplicitous conduct" in promising full benefits in exchange for plaintiffs' consent on an extension.[79] This conduct and the government's arguments about it spawned the post-certification briefing, which drove up the plaintiffs' requested attorneys' fees.[80] Critiquing this conduct was well within the court's bailiwick: "[I]t is beyond cavil that a court has the inherent authority, where necessary, to hold litigants and counsel responsible for their statements made in the course of litigation, whether through 'sanctions, contempt proceedings, or other action.'"[81] The court thus denied reconsideration of footnote 50.

The court also denied reconsideration of footnote 99, and footnote 108 and related text in its earlier opinion because of the government's misrepresentation of case holdings in its briefing to the court on enhancements and cost-of-living adjustments to attorneys' fee awards. In footnote 99 the court criticized the government's selective use of cases to overstate the degree of unanimity among the courts that fee enhancements are denied where knowledge of general administrative law alone—and not a specialized area of administrative law—would

75. *Id.* at *3.
76. *Id.*
77. *Id.*
78. *Id.* at *4.
79. *Id.*
80. *Id.* at *3.
81. *Id.* at *5.

allow an attorney to prosecute a case.[82] The court denied reconsideration of the footnote, which read in part: "[H]owever, counsel have a duty of candor toward the court; and misrepresenting the state of the law is potentially sanctionable conduct."[83]

In footnote 108 the court criticized the government's misleading and selective use of authority to support its argument against cost-of-living adjustments to the statutory hourly rate for attorneys' fee awards. The court wrote that the government's "distortion" of a case and misleading claim about the EAJA "border[] on the sanctionable."[84] The court affirmed its earlier analysis of the government's arguments, set out in detail in the earlier case,[85] and denied the government's motion for reconsideration.

BMC Software says nothing more about professional responsibility than what a competent attorney should already know. Although it neither sets new boundaries nor establishes new principles of professional responsibility, the case teaches the government that the court is willing to openly criticize counsel's questionable tactics and that the court expects government attorneys to deal honestly with opponents and with the court. Further, it tells plaintiffs not only to look out for such tactics, but also that they have a receptive court to hear complaints and arguments when they arise.

B. *Agency Investigations and Decisions*

The court was also critical of the Departments' behavior in investigating TAA applications. The court in 2008 consistently remanded cases where a Department's investigation was insufficient or contrary to law, where the results of the investigation did not line up with the Department's conclusions, and where the Department failed to adequately explain its reasons for its decisions. The 2009 amendments to the labor program partially address some of these problems by specifically authorizing the Department to seek particular information[86] and by simplifying the qualification standards.[87] But an intractable Department may continue to conduct inadequate investigations and to issue inconsistent decisions, even under the new law. These cases therefore retain

82. *Id.* at *6.

83. *Id.* at *7.

84. Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor, 519 F. Supp. 2d 1291, 1364 n.108 (Ct. Int'l Trade 2007).

85. *Id.* at 1364–67.

86. 19 U.S.C.A. § 2272(e)(2) (West 2009).

87. *See generally* 19 U.S.C.A. § 2272(e)(2) (West 2009).

their vitality and importance, even under the 2009 amendments.

This section discusses labor and agriculture decisions separately because of a particular recurring issue in the agriculture program. It begins with decisions on the labor program.

1. Department of Labor Evaluations and Decisions

The court in 2008 remanded three cases because the Department either inadequately investigated workers' claims, insufficiently explained its decision, or some combination of the two. These cases reflect the court's continued commitment to ensuring that the Department acts consistently with the interests of the workers and with the program's remedial purposes.

In the first case, *Chen*, also discussed earlier, the court concluded that the Department's investigatory findings, which were indeed based on substantial record evidence, simply did not add up to the Department's conclusions about the case.[88] There, the Department found that the company "did not send printed circuit boards to a domestic facility of the foreign customer."[89] But this finding had nothing to do with the Department's conclusion, because it "does not rule out the possibility that like or directly competitive articles were imported into the United States" and "contributed so significantly to the Company's loss of sales to the foreign customer during the period under investigation as to have been an important cause of the Company's ceasing its manufacturing activity in Boston."[90]

The *Chen* court, underscoring the "remedial purpose of the statute," ruled that the Department's investigation was inadequate for failing to investigate this possibility and for failing to connect its investigation with its conclusion.[91] But the court stopped short of outright certifying the workers itself; instead, it remanded with typically specific instructions to the Department to consider the plaintiffs' claims.[92]

The court ruled that the Department's conclusions were similarly inadequate in *Fairchild*.[93] In that case, also discussed earlier, the court held that the Department misunderstood or failed to define terms for the products at issue in the case.[94] Thus the Department seemed to

88. *Chen*, 587 F. Supp. 2d at 1298–99.
89. *Id.* at 1298.
90. *Id.* at 1299.
91. *Id.* at 1301.
92. *Id.* at 1301–02.
93. *Fairchild Semi-Conductor Corp.*, 2008 WL 1765519.
94. *Id.* at *5.

understand "wafer chips" as something different than what the company intended.[95] Moreover, the Department's reasoning—that further processed articles were "neither like nor directly competitive" with the original articles—was in conflict with the Department's regulation.[96] The regulation defined an imported article as "directly competitive with a domestic article at an earlier or later stage of processing" under certain circumstances.[97] The court remanded the case to the Department for the second time[98] and later affirmed the Department's certification of the workers.[99]

Finally, in *United Steel v. U.S. Secretary of Labor*,[100] the court remanded the Department's refusal to extend the certification period, because the Department failed to adequately explain the basis for its decision.[101] In that case, the company separated a group of workers during the certification period, but also retained a group of workers three to four weeks beyond the certification period in order to maintain the plant and to help transition to the plant's new owner.[102] (Importantly, production continued during this period.) When the new owner separated these hold-over workers, they filed first for recertification (which the Department denied) and then for an extension of the certification period.[103]

The hold-over workers claimed that they were separated because of increased imports, just like the workers separated during the certification period, and that they would have qualified under the original certification but for their short retention to keep the plant running during the transfer in ownership.[104] Moreover, they argued, the Department had granted extensions under similar circumstances in eleven previous cases, including *O/Z Gedney* and *Wiegand*.[105]

The Department rejected these claims and denied the extension. It wrote that, unlike this case, *O/Z Gedney* and *Wiegand* involved workers retained *after* production stopped, and that the hold-over workers did

95. *Id.* at *4.

96. *Id.* at *5.

97. 29 C.F.R. § 90.2 (2009).

98. *Fairchild Semi-Conductor Corp.*, 2008 WL 1765519, at *5.

99. *Fairchild Semi-Conductor Corp.*, 2008 WL 2968599, at *1.

100. United Steel v. U.S. Sec'y of Labor, No. 04-00492, 2008 WL 1899990 (Ct. Int'l Trade Apr. 30, 2008).

101. *Id.* at *9.

102. *Id.* at *3.

103. *Id.* at *2–*3.

104. *Id.* at *3.

105. *Id.* at *5, *8.

not qualify anyway, as evidenced by the Department's earlier investigation into and denial of recertification.[106]

The court ruled that the Department's explanation was insufficient and remanded for further consideration. In particular, the court held that the Department failed to explain why its basis for distinguishing *O/Z Gedney* and *Wiegand* mattered—why the stop in production in those cases was a sufficient basis for not following them here.[107] Moreover, the court ruled that the Department's basis for its earlier denial of *recertification* had apparently nothing to do with its process in denying an *extension* here.[108] And, "most significantly," the Department failed to articulate a policy for extensions that would allow the court to "follow and review its line of analysis, its reasonable assumptions, and other relevant considerations."[109]

The Department subsequently denied an extension, stating that its earlier investigation into the requested recertification revealed that the retained workers were not separated because of increased imports—in fact, imports declined or increased only slightly, and company sales actually increased during the relevant period—but rather because the plant's new owner elected to terminate them.[110] The court most recently affirmed the Department's denial, ruling that its revised explanation was now sufficient.[111]

These cases reaffirm what litigants have observed for a long time: the court carefully scrutinizes the Department's investigations and decisions for their accuracy and consistency with the facts, their compliance with the law, and their internal coherence. Moreover, the court is perfectly willing to send a case back to the Department—sometimes more than once—to force an investigation that is complete and to force conclusions that are both logically derived from the investigation and fully compliant with the law. Thus, these cases leave open and even expand potential lines of challenge for plaintiffs. And while the 2009 amendments change the underlying standards for qualification and authorize the Department to engage in more thorough investigations, the court's 2008 rulings on the Department's investigations and decisions will apply to the new standards and require the Department to

106. *Id.* at *7.

107. *Id.*

108. *Id.* at *9

109. *Id.*

110. United Steel v. U.S. Sec'y of Labor (*United Steel II*), No. 04-00492, 2009 WL 1175654, at *4–*5 (Ct. Int'l Trade Apr. 11, 2008).

111. *Id.*

conduct its investigations and issue its decisions accurately, completely, and in compliance with the law.

2. Department of Agriculture Evaluations

The Department of Agriculture's evaluations of producers' applications in 2008 all involved a single question: to what extent must the Department consider supporting material other than an applicant's tax returns in determining net income? The 2009 amendments, which do not require a net income calculation, render this specific question moot. But the cases' core holding—that the Department must go beyond a rote review of a single line on a single document when the applicant proffers additional material—may apply in a different way under the new standards. Even if this more general principle does not apply under the new standards, however, these cases continue to represent the court's appropriately careful scrutiny of Department decision-making.

The court's cases on the method of Department decision-making in the agriculture program begin with the Federal Circuit's defining 2006 case, *Steen v. United States.*[112] *Steen* is a mainstay of the court's rulings on net income and, more generally, on the court's approach to Department investigations, and it plays a central role in the litigant's arguments and the court's rulings in the 2008 cases. All the cases on this issue deal with the core meaning of *Steen*, but the answer, as it turns out, is quite easy: *Steen* requires that the Department consider all evidence submitted in support of a TAA application.

Steen involved a plaintiff's claim that he qualified for TAA because his net farm income in the certified commodity declined, even though his overall net farm income increased.[113] (The plaintiff's income from other commodities more than compensated for his losses in the certified commodity.) The Department denied TAA benefits, and the court affirmed. The plaintiff appealed to the Federal Circuit, arguing that the Department's interpretation was impermissibly rigid, because it merely considered his aggregate "net income" as reported to the IRS.[114]

The Federal Circuit upheld the Department's interpretation of net farm income and its use of the plaintiff's tax returns to determine net

112. Steen v. United States, 468 F.3d 1357 (Fed. Cir. 2006).

113. *Id.* at 1359.

114. *Id.* at 1363.

fishing income. The court wrote that the plaintiff never suggested that his tax returns did not accurately and completely reflect his net fishing income, only that the Department inflexibly relied only upon them. The court wrote that the Department's regulations "make it reasonably clear" that the Department cannot rely solely on tax returns when other information is available.[115] But that was not the case with *Steen*.[116]

In arguing these principles in cases last year, the government invariably focused on the deference that the Federal Circuit granted to the Department and the fact that the Federal Circuit upheld the Department's use only of tax returns in determining net income. In contrast, plaintiffs invariably focused on the language confirming that the Department cannot rely solely on tax returns when other information is available.

When it addressed these arguments, the U.S. Court of International Trade consistently sided with the plaintiffs and ruled that the Department must look beyond a single line of a plaintiff's tax returns in determining net income. Thus in *T.W.R. v. U.S. Secretary of Agriculture*,[117] the plaintiffs claimed that extraordinary loans in certain years—loans to keep the companies afloat, and which were not captured by the net income line on the plaintiffs' tax returns—distorted the net income line on their tax returns. Without the loans, the plaintiffs' income would have dropped over the relevant two-year period. The court remanded to the Department for consideration of these claims, with a specific instruction to "fully examine all information submitted by the plaintiff in accordance with the remedial nature of the TAA statute."[118] The court later affirmed the Department's award of TAA benefits for these reasons.[119]

Similarly, in *Dorsey v. U.S. Secretary of Agriculture*,[120] the plaintiff claimed that its one-time purchase and deduction for a wind machine distorted its net income on that line of its tax returns. The court remanded the case to the Department for consideration of the evidence that the plaintiffs proffered in support of their claim, and later

115. *Id.* at 1363.

116. *Id.* at 1363–64.

117. T.W.R., Inc. v. U.S. Sec'y of Agric., No. 05-00356, 2008 WL 2191774 (Ct. Int'l Trade May 28, 2008).

118. *Id.* at *5.

119. T.W.R., Inc. v. U.S. Sec'y of Agric., No. 05-00356, 2008 WL 4787599 (Ct. Int'l Trade Nov. 3, 2008).

120. *Dorsey I*, 2004 WL 205214.

affirmed the Department's award of benefits after the remand.[121]

Finally, in *Durfey v. U.S. Secretary of Agriculture*, the plaintiffs claimed that their net income was better reflected in an accrual-based accounting (provided by their accountant, and not in the tax returns) than in a cash-based accounting (which formed the basis of their tax returns).[122] The court, again citing *Steen*, remanded to the Department for reconsideration based on the accrual-basis data provided by the accountant[123] and later affirmed the Department's award of benefits after the remand.[124]

The only limit to this principle is contained within the principle itself: the plaintiff must proffer evidence or make arguments other than those contained in their tax returns before the court ordered the Department to consider that evidence or those arguments. Thus in *Den Hoed v. U.S. Secretary of Agriculture*, the court upheld the Department's denial and dismissed the case because the plaintiffs simply failed to provide any evidence, make any arguments, or even allege in their pleadings that their net income declined.

The upshot of the court's rulings in *Steen* is that the Department cannot only consider a plaintiff's tax return in determining net income when the plaintiff provided other information. As the Federal Circuit in *Steen* recognized, this is exactly what the Department's regulations require,[125] but the Department has challenged this in every case where the issue was litigated. This means that plaintiffs should include any material—documents, records, letters from accountants or others, written arguments, or anything else that shows why and how their true net income declined—in their initial applications or whenever they may supplement the record. The Department must consider these in determining net income.

V. CONCLUSION

The court in 2008 was characteristically critical of the Departments and directive in its remands, but it also dismissed cases and upheld the Departments when a plaintiff failed to proffer sufficient evidence to qualify. The court's decisions thus provide guidance to the Departments in interpreting the act, investigating applications, and issuing

121. *Dorsey III*, 2009 WL 22878, at * 1.

122. Durfey v. U.S. Sec'y of Agric., 556 F. Supp. 2d 1378, 1381 (Ct. Int'l Trade 2008).

123. *Id.* at 1381–82.

124. Durfey v. U.S. Sec'y of Agric., 575 F. Supp. 2d 1387 (Ct. Int'l Trade 2008).

125. *Steen*, 468 F.3d at 1363.

decisions. They also provide guidance to future plaintiffs in challenging the Departments' decisions.

But the court's 2008 cases will not be particularly useful for their precise holdings. The 2009 amendments to the programs abrogated much of the court's work last year. Litigants, especially plaintiffs, will have to use the larger principles animating the court's 2008 decisions in challenging the Departments under the new act.