

# Decisions of the United States Court of International Trade

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[PUBLIC VERSION]

(Slip Op. 03–15)

FMC CORP, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 01–00807

[Plaintiff’s Motion for Judgment upon an Agency Record Denied.]

(Decided February 11, 2003)

*Perkins Coie LLP*, (Thomas V. Vakerics), Alyssa Chumnanvech, for Plaintiff.  
*Robert D. McCallum, Jr.*, Assistant Attorney General, United States Department of Justice, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, (*Lucius B. Lau*), Assistant Director, (*John N. Maher*), Trial Attorney; *Augusto Guerra*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

## OPINION

### I. INTRODUCTION

BARZILAY, *Judge*: Plaintiff’s Motion for Judgment upon an Agency Record under USCIT Rule 56.2 challenges two elements of the Department of Commerce’s final results of the third administrative review in *Persulfates From the People’s Republic of China: Final Results of Anti-dumping Duty Administrative Review* (“*Final Results*”), 66 Fed. Reg. 42,628 (Aug. 14, 2001), with regard to persulfates exported from the People’s Republic of China (“PRC”) by the Respondent Shanghai Ai Jian Import and Export Corporation (“Ai Jian”). Plaintiff FMC Corporation (“FMC”) is a domestic manufacturer of the subject merchandise. FMC contends that the decision of the Department of Commerce (“Department” or “Commerce”) was wrong to base the selling, general and administrative (“SG&A”) expense ratio on the financial statements of the surrogate company because it “contraven[ed] the Department’s duty, when conducting an antidumping investigation, to calculate margins as accurately as possible.” *Pl.’s Mem. in Supp. of Mot. for J. on the Agency R.* (“*Pl.’s Br.*”) at 4 (citing *Rhone-Poulenc, Inc. v. United States*,

899 F.2d 1185, 1191 (Fed. Cir. 1990)). Plaintiff claims the calculations were not accurate due to the dissimilar cost structure between the company's subject and non-subject merchandise, which resulted in a severe understating of SG&A expenses. *Id.* at 4–5. Plaintiff also argues that Commerce's decision to rely on Respondent's market economy ocean freight rates was "unsupported by substantial evidence and is otherwise contrary to law" because there were indications the invoices were fictitious. *Pl.'s Br.* at 7. For the reasons detailed below, the court denies Plaintiff's motion and upholds Commerce's determination.

## II. BACKGROUND

Commerce, in the 1997 final determination of an antidumping investigation, found that persulfates imported from China were being sold in the United States at less-than-fair-market-value. *See Notice of Final Determination of Sales at Less Than Fair Value: Persulfates From the People's Republic of China ("Final Determination")*, 62 Fed. Reg. 27,222 (May 19, 1997). No other company with publically available financial statements in an economy comparable to the PRC produced persulfates at the time of the initial investigation. *Id.* at 27,228. FMC is the sole producer in the United States of persulfates. *Pl.'s Br.* at 2. Commerce initiated its original investigation of persulfates in 1996, in response to an antidumping petition filed by FMC. *See Initiation of Antidumping Duty Investigation: Persulfates From the People's Republic of China*, 61 Fed. Reg. 40,817 (Aug. 6, 1996). The investigation set an antidumping duty rate of 34.41 percent for Ai Jian. *See Notice of Amended Antidumping Duty Order: Persulfates From the People's Republic of China*, 62 Fed. Reg. 39,212 (July 22, 1997). There have been three subsequent reviews. It is the third review that is the subject of this case. *See Final Results*, 66 Fed. Reg. at 42,628. The third review set a duty rate of 0.04 percent, which is *de minimis*. *See id.* at 42,629. Over the course of the three reviews the dumping margin has fallen with each review. The first review set a rate of 5.54 percent. *See Persulfates From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review ("First Amended Administrative Review")*, 65 Fed. Reg. 1,356 (Jan. 10, 2000). The second review set a rate of 2.62 percent. *See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review ("Second Administrative Review")*, 65 Fed. Reg. 46,691, 46,692 (July 31, 2000).

During the initial investigation, Commerce had used the financial statements of National Peroxide ("NPL"), an Indian company that produces similar, but not identical merchandise to calculate surrogate values. *See Final Determination*, 62 Fed. Reg. at 27,229. During the first annual review, Commerce found that another Indian company had begun producing persulfates. Citing a traditional practice of using surrogate companies that manufacture the subject merchandise, Commerce switched and began using the financial statements from Calibre Chemicals Pvt. Ltd. ("Calibre"). *See Persulfates from the People's Republic of*

*China: Final Results of Antidumping Duty Administrative Review* (“*First Administrative Review*”), 64 Fed. Reg. 69,494, 69,499–500 (Dec. 13, 1999).

Selling, general and administrative expenses are one element that Commerce uses to establish a total cost of goods sold in a non-market economy. To establish a market-economy value for those elements, Commerce will use the financial data of a surrogate producer. The first step is for Commerce to establish an SG&A ratio, which is derived “by dividing the company’s general expenses by its total costs of sales.” *Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Persulfates from the People’s Republic of China for the Period July 1, 1999 through June 30, 2000; Final Results* (“*Issues and Decision Memo*”) at 13. The cost of sales includes labor, materials, factory overhead, and energy costs. *See Preliminary Results Factors Valuation Mem., Attachment 11: SG&A Expenses and Profit* (Apr. 2, 2001). This ratio for SG&A is then applied to the cost of manufacturing the subject merchandise to determine an SG&A expense amount for the subject merchandise. According to Commerce, “general expenses are so indirectly related to a particular production process that the most reasonable allocation basis is the company’s total cost of manufacturing.” *Issues and Decision Memo* at 13.

Plaintiff, in the administrative proceedings below, challenged the use of Calibre’s financial data for surrogate values. *Id.* at 11. Calibre produces multiple product lines. One is subject merchandise, and the others are non-subject merchandise. FMC argued that the high cost of raw materials to produce the non-subject merchandise resulted in an overstatement of the SG&A ratio for non-subject merchandise, and an understatement of those costs for persulfates. *Id.* Commerce rejected this argument. *Id.* at 13. However, Commerce did accept Plaintiff’s argument that Calibre was not an accurate source for financial information related to factory overhead (“FOH”) costs, and agreed to reallocate Calibre’s FOH expenses to correct inaccuracies. *Persulfates from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 18,439, 18,443 (Apr. 9, 2001). Plaintiff now appeals Commerce’s use of Calibre’s SG&A expenses, which Plaintiff claims are distorted in a manner similar to the FOH expenses. *Pl.’s Br.* at 4.

After the third review preliminary results, Plaintiff raised objections to Ai Jian’s submission of freight invoices. *See Issues and Decision Memo* at 2. FMC argued that the freight invoices were probably fraudulent because two of the four submitted had dates that differed by eleven months from the actual invoice payment date. *Pl.’s Br.* at 18. In addition, the mistake was made by two different shipping companies and the date was the same on both misdated invoices. *See id.* In response to this discrepancy, Commerce requested an explanation and supporting documentation from Respondent Ai Jian. *Issues and Decisions Memo* at 2. Ai Jian claimed that the dates were incorrect due to a clerical error by the

shipping companies. *Id.* at 2. To support its claim of market economy freight costs, Ai Jian provided an internal accounting voucher, an operating sub-ledger, a bank deposit sub-ledger, and a bank statement. *Id.* at 5. It also provided a foreign exchange voucher, which was reconciled to the company's internal documents. *Id.* In the final results, Commerce rejected Plaintiff's argument and found that Ai Jian paid market economy prices for ocean freight expenses. *Id.* Plaintiff appeals this decision as well. This court has jurisdiction over this matter under 28 U.S.C. § 1581(c).

### III. STANDARD OF REVIEW

The court must evaluate whether Commerce's decisions are supported by substantial evidence on the record or are otherwise in accordance with law. See 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). This Court noted, "[i]n applying this standard, the court affirms [the agency's] factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)).

The court may not reweigh the evidence or substitute its own judgment for that of the agency. See *Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989). Substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.*, 716 F. Supp. at 21 (citations omitted). Additionally, absent a showing to the contrary, the agency is presumed to have considered all of the evidence in the record. *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988) (citations omitted).

To determine if the agency's interpretation of the statute is in accordance with law "we must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex VI. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The expressed will or intent of Congress on a specific issue is dispositive. See *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233-237 (1986) (citing *Chevron*, 467 U.S. at 843.). If the court determines that the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. See *Chevron*, 467 U.S. at 843. This deference is due "when it appears that Congress delegated authority to the agency generally to make rules carrying the force

of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). This deference is not limited to notice and comment rulemaking but is also given to those “statutory determinations that are articulated in any ‘relatively formal administrative procedure.’” *Pesquera Mares Australes Ltda., v. United States*, 266 F.3d 1372, 1381 (Fed. Cir. 2001). Therefore, statutory interpretations articulated by Commerce during antidumping proceedings are entitled to judicial deference under *Chevron. Id.* at 1382.

#### IV. DISCUSSION

Establishing antidumping duty rates begins by comparing the normal value of the product in its home market with the export price of the goods sold in the United States. *See* 19 U.S.C. § 1677b(a) (1999). In the case of a non-market economy like the PRC, if Commerce cannot rely on the information available from the respondent, it will determine normal value “on the basis of the value of the factors of production \* \* \* based on the best information available regarding the values of such factors in a market economy country.” § 1677b(c)(1). In this case, Commerce established India as the appropriate surrogate country. Within that surrogate country, Commerce will then choose among various sources to value specific elements of normal value. *See e.g., Final Determination*, 62 Fed. Reg. at 27,229.

##### *A. Commerce’s Use of Calibre’s SG&A Expenses Is Permissible.*

Commerce is charged under the antidumping laws with establishing dumping margins that are as accurate as possible. *See Rhone-Poulenc*, 899 F.2d at 1191. Consistent with this charge, Commerce has developed various methodologies for assessing the likely market value of goods that are produced in non-market economies. *See, e.g., First Administrative Review*, 64 Fed. Reg. at 69,499. As part of this practice, Commerce has developed a preference for selecting surrogate value sources that rely on financial statements of companies that produce the subject merchandise of an investigation. *Id.* at 69,500. However, if the surrogate data is distorted or otherwise unreliable, Commerce will not rely on that data. *Id.*

During the initial period of investigation Commerce did not have access to the financial statements of a foreign persulfates manufacturer existing in an economy comparable to the PRC. *See Final Determination*, 62 Fed. Reg. at 27,229. Commerce, unable to rely on Ai Jian’s non-market economy data, and unable to use a producer of the subject merchandise, used the financials of NPL, an Indian based company that produces similar merchandise. *First Administrative Review* at 69,500. After the initial investigation, Calibre, also an Indian company, began producing persulfates. *Id.* Commerce, citing its preference to use companies that produce the subject merchandise as surrogates, began to use Calibre’s financial statements to calculate the SG&A expenses for a persulfate producer in calculating Ai Jian’s normal value and export price. FMC, during the administrative process and before this court, argues

that Calibre's financial statements are not representative and, therefore, are not reliable as a surrogate value for SG&A expenses. *Pl.'s Br.* at 9. FMC points out that 90 percent of Calibre's raw material costs are exclusively related to the material used in production of non-subject merchandise. *Id.* Plaintiff claims that this results means:

Calibre's cost of goods sold will greatly exaggerate the amount of SG&A expenses attributable to the company's production of non-subject merchandise, *i.e.*, potassium bromate and potassium iodate, causing the SG&A expenses attributable to the company's production of persulfates to be severely understated.

*Id.*

In this case, Commerce did acknowledge that for the purposes of calculating the FOH costs, the use of Calibre's financial statements produced results that required adjustment because of the disparity in the cost structure differences between subject and non-subject merchandise. In the preliminary results, Commerce explained how those adjustments were made:

During the first administrative review, we determined that it was appropriate to allocate Calibre's overhead expenses between its product lines because of the differing cost structures between Calibre's production of subject and non-subject merchandise \* \* \*. For purposes of this analysis, we considered Calibre's raw material groups "sulfates" and "acids" to be related to its production of potassium persulfates, and the raw material groups "halogens" and "alkalis" to be related to its production of potassium bromate and potassium iodate. Because of the differing cost structures attributable to subject and non-subject merchandise, we allocated Calibre's factory overhead expenses between subject and non-subject merchandise on the basis of raw material consumption.

*Prelim. Results Factors Valuation Mem.* at 7-8.

Plaintiff claims that like the FOH calculation, the SG&A ratio calculation is not reliable without adjustment. *Pl.'s Br.* at 11. However, unlike in the FOH numbers, there is no "cost driver" which can be relied on to correct the distortions. For that reason FMC asked that Commerce return to using the financial statements of another Indian company, NPL, but Commerce rejected that request. *Issues and Decision Memo* at 11.

FMC points to at least one other occasion where Commerce has refused to use the financial statements of a company that produced the subject merchandise for surrogate purposes, because "the product mix" made the financials unreliable. *Pl.'s Br.* at 12. In *Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China*, Commerce determined, according to Plaintiff, that "the nature of the operations of the company, unrelated to production of the subject merchandise, made it unsuitable as a source of surrogate value \* \* \*." *Id.* at 12 (citing the Issues and Decision Memo for *Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China*, 65 Fed. Reg. 19,873 (Apr. 13, 2000)).

FMC contends that because Commerce decided that NPL's financial data were sufficiently accurate for surrogate purposes in the initial investigation, for Commerce to now use Calibre's data, which includes non-correctable distortions, is unsupported by substantial evidence and otherwise not in accordance with law. *See id.* at 15.

Defendant replies that using Calibre's financial information is consistent with past practice and the statute, and that there is ample justification for the policy. The statute requires that when products are imported into the United States from a non-market economy Commerce will determine the normal value of the "subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). The statute does not specify how to calculate the individual factors of production. Through practice Commerce has enunciated a policy of calculating the general and administrative expenses "based upon the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales." *Def.'s Br.* at 19. Commerce uses a company-wide calculation for general expenses because they do not relate to a specific product line. *Id.* (citing, *inter alia*, *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 11,555 (Feb. 26, 2001)).

*1. Calculating FOH and SG&A Costs Differently Is Permissible.*

Commerce grants that it does not treat the calculations for FOH and SG&A costs in the same manner. As Commerce explained in its *Issues and Decision Memo*, FOH costs are traditionally calculated to factor in specific product costs for subject merchandise. SG&A costs, in contrast, are not traditionally based on product specific costs:

Unlike factory overhead costs, SG&A expenses are not considered to be directly related to the production of merchandise. In fact, in most cases, general expenses are so indirectly related to a particular production process that the most reasonable allocation basis is the company's total cost of manufacturing. Thus, while it may be appropriate to allocate the factory overhead costs between subject and non-subject merchandise on a basis other than cost, we find no basis to allocate SG&A expenses to specific product lines using any other method.

*Issues and Decision Memo* at 13–14 (citing *First Administrative Review*, 64 Fed. Reg. at 69,499–500).

FMC's argument that the acknowledged distortions in the FOH costs, due to the disparity in production costs for subject and non-subject merchandise, require discounting the value of the SG&A expenses is not supportable. FOH costs are directly tied to material costs. However, raw material costs do not generally directly impact the SG&A ratio, which is calculated on a company-wide basis. This Court has previously upheld

Commerce's policy to base SG&A costs on a company-wide determination when a company produces subject and nonsubject merchandise. See *U.S. Steel Group A Unit of USX Corp. v. United States*, 22 CIT 104, 106, 998 F. Supp. 1151, 1154 (1998) (citing *Rautaruukki Oy v. United States*, 19 CIT 438, 444 (1995)). That distinction is rooted in a consistent practice that this Court has found is proper under the statute. Therefore, it is not contrary to law for Commerce to employ different methodologies for calculating FOH and SG&A costs.

## 2. Significant Raw Materials Variations.

While Commerce is able to justify its different calculation methodologies for FOH and SG&A costs, Commerce must also address Plaintiff's claim that the SG&A ratio is distorted on its own terms, not just in relation to the FOH costs.

In the administrative proceeding below, FMC challenged the use of Calibre as a surrogate for calculating SG&A costs despite the fact that Calibre produces the subject merchandise. FMC claimed that the "characteristics of the goods manufactured by Calibre" and Calibre's "product mix" made its financial information "unreliable." *Perkins Coie Case Brief on behalf of Petitioner FMC* ("Pet.'s Br.") (May 9, 2001) at 23, in *Def.'s Proprietary App.* Tab C, at 69. FMC pointed out that two other products Calibre produced, potassium bromate and potassium iodate, accounted for "90 percent of Calibre's 1999–2000 raw material costs" and for "over 68 percent of Calibre's cost of sales for the 2000 fiscal year." *Pet.'s Br.* at 24. To explain the "characteristics of the goods manufactured" and "product mix" of Calibre, which FMC claims make the financials unreliable, FMC points to Commerce's own findings in the third review which found:

\* \* \* Calibre consumed a relatively low quantity of raw materials related to non-subject merchandise (*i.e.*, potassium bromate and potassium iodate) which incurred high raw material costs. On the other hand, the majority of Calibre's consumption of raw materials is attributable to subject merchandise (*i.e.*, potassium persulfates) with relatively low costs.

### *Prelim. Results Factors Valuation Mem.* at 7–8.

Commerce rejected FMC's challenge to Calibre's financials. As a preliminary matter, Commerce pointed to its "long-standing practice in market-economy cases with respect to allocating general expenses to individual products is to calculate a rate by dividing the company's general expenses by its total cost of sales." *Issues and Decision Memo* at 13. Commerce justifies using company-wide expenses because "general expenses are costs that relate to the company's overall operations." *Id.* Commerce noted that the "company-wide" calculation was developed for investigations involving market economies, and the investigation of Ai Jian involves a non-market economy. However, "the issue at hand involves deriving an SG&A ratio using the financial data of a market-economy company." *Id.* Commerce also states that "in most cases, general expenses are so indirectly related to a particular production process that



the most reasonable allocation basis is the company's total cost of manufacturing." *Id.* Commerce's position can be summarized as follows: it has a "preference" for using producers of the subject merchandise, and it has a "long-standing practice" of using company-wide costs for general expenses, which is based on a general observation that "in most cases" SG&A expenses are only "indirectly related" to a particular product line, and, therefore, the "most reasonable allocation basis is the company's total cost of manufacturing." Commerce concludes its explanation of its general practice by observing that it "find[s] no basis to allocate SG&A expenses to specific product lines using any other method." *Id.* at 14.

FMC does not challenge Commerce's interpretation of the antidumping statute to permit these general principles and practices. FMC is pointing to specific evidence in the record that indicates that the general practice should not be applied in this circumstance. FMC argues that there is a "basis" for allocating SG&A costs along product lines, because the material costs of non-subject merchandise are so large in comparison to subject merchandise that they cannot be considered merely "indirectly related" to a specific product line. *See Pl.'s Br.* at 11.

The task before this court is to determine if there is "substantial evidence" to justify Commerce's decision to use the financials of Calibre over NPL. Responding to FMC's contention that Calibre's data is unreliable, Commerce states that "petitioner has presented no new evidence." *Issues and Decisions Memo* at 14. Commerce explains further in a footnote:

The petitioner's argument relies solely on the fact that Calibre produces more non-subject than subject merchandise. We find that this fact does not lead to the automatic conclusion that it is distortive to allocate SG&A expenses on the basis of cost of sales. On the contrary, we find that the two other products produced by Calibre are comparable to persulfates.

*Issues and Decision Memo* at 14 n.7 (citations omitted). Commerce found the various product lines to be comparable because they are used for similar purposes. *See id.* (citing Aug. 7, 2001, memorandum from Shawn Thompson to the file entitled "Source Data Used to Identify the Uses of Potassium Persulfates, Potassium Iodate and Potassium Bromate in the 1999-2000 Antidumping Duty Administrative Review of Persulfates from the [PRC]").

Commerce also distinguishes two instances when it did not rely on the financial statements of a surrogate producer of the subject merchandise. In *Certain Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review* ("*Lock Washers*"), Commerce rejected using data from a company that produced both subject and non-subject merchandise because the company produced only a "minuscule" amount of the subject merchandise. *See Def.'s Br.* at 22 n.1 (citing 61 Fed. Reg. 41,994 (Aug. 13, 1996)). Defendant points out that, unlike in *Lock Washers*, Calibre produces the sub-

ject merchandise in commercial quantities. *See id.* In *Apple Juice Concentrate*, cited by Plaintiff in its brief, Commerce rejected the use of a producer because the primary business of the proposed surrogate company was not manufacturing. *See* Comment 8 to *Issues and Decision Mem. for the Investigation of Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China*, 65 Fed. Reg. 19,873 (Apr. 6, 2000) (finding that the total revenues of the proposed surrogate company were primarily derived from service-oriented rather than manufacturing operations).

If this were all that were in the record to provide a foundation for Commerce's decision it would not be sufficient. Contrary to what Commerce claims, FMC did not rely "solely" on the relative size of Calibre's product lines. FMC rested its challenge on the fact, verified by Commerce in its FOH analysis, that non-subject merchandise represents a disproportionate amount of the costs of raw materials which has significant impact on the SG&A ratio. That is a more substantial challenge than the fact that Calibre merely makes more of one product than another. In addition, the disparity between the product lines that Plaintiff claims creates a problem is not that they have different ultimate uses, but that raw materials for non-subject merchandise are significantly more expensive than for subject merchandise. *See Pl.'s Br.* at 11; *Pet.'s Br.* at 23. Commerce misrepresents FMC's argument and dismisses it for irrelevant reasons. Standing alone, a decision is not based on substantial evidence if it relies on general preferences which have been called into doubt by evidence on the record. *See Rhodia, Inc. v. United States*, 25 CIT \_\_\_, \_\_\_, 185 F. Supp. 2d 1343, 1348 (2001) (stating that Commerce must articulate a rational connection between the facts found and the choice made).

However, Commerce cites to more evidence when explaining its decision to use Calibre instead of NPL as a surrogate. The relief FMC seeks here is a direction to Commerce to use the NPL financials instead of the Calibre financials. *Pl.'s Br.* at 11. FMC argues Calibre's financials are not reliable for a specific reason, but it does not believe they can be adjusted to reflect an accurate SG&A ratio. This is because there is no "cost driver" which could permit allocation of material costs among the product lines. *See id.* This puts Commerce in the position of weighing two flawed sets of financial data for calculating a surrogate value for SG&A costs. Commerce explicitly undertook this task and weighed several pieces of relevant evidence. *See Issues and Decision Memo* at 14.

First, Commerce restates its preference for "selecting surrogate value sources that are producers of identical merchandise, provided that the surrogate data is not distorted or otherwise unreliable." *Id.* Second, Commerce casts doubt on the reliability of NPL's financial data for the period of review because NPL "incurred certain expenses related to property development." *Id.* at 14 n.8 (citations omitted). Third, Commerce valued FOH and profit based on Calibre's financials because to value SG&A based on NPL's financials would "result in [Commerce's]

applying a profit ratio that would bear no relationship to the SG&A ratio.” *Id.* at 14 (footnote omitted). Fourth, mixing the two financial statements raises the “potential for double counting or under-counting of expenses because different companies may classify expenses differently.” *Id.* at 15. Plaintiff does not challenge any of these findings.

Commerce does acknowledge that in at least one case it has used multiple sources. *See id.* at 15 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Beryllium Metal and High Beryllium Alloys From the Republic of Kazakstan*, 62 Fed. Reg. 2,648 (Jan. 17, 1997)). However, in that case, a lack of detailed information required using more than one source. In this case, Commerce found Calibre’s financial data are detailed enough to use across the board. *Id.*

Commerce has wide discretion in choosing among various surrogate sources. “When Commerce is faced with the decision to choose between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly.” *Technoimportexport, UCF America Inc. v. United States*, 16 CIT, 13, 18, 783 F. Supp. 1401, 1406 (1992). Commerce has provided a thorough and complete explanation for why it chose Calibre over NPL. Despite the flaws Plaintiff has identified in Commerce’s analysis of SG&A costs, it does not seek to have those costs adjusted. Rather, Plaintiff seeks to replace one set of flawed data with another set of flawed data. Plaintiff has raised a question about one element of Calibre’s financials. However, it has not countered the various problems Commerce raised with regard to using NPL’s financials. Commerce did not choose Calibre as a surrogate because it was a perfect match. It chose Calibre because it was a better option than NPL. Plaintiff’s argument does not overcome the substantial evidence supporting Commerce’s ultimate conclusion. Faced with a difficult choice, Commerce made a reasonable decision. The “substantial evidence” standard of review is clear in granting deference to agency determinations. The court will not reweigh the evidence or substitute its own judgment for that of the agency. *See Granges Metallverken AB*, 716 F. Supp. at 21. Under this standard, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Id.* (citations omitted). Commerce’s decision to use Calibre as a surrogate for calculating the SG&A ratio is sustained as based on substantial evidence and is in accordance with law.

#### *B. Market Economy Ocean Freight Expenses.*

FMC challenges Commerce’s decision to value Ai Jian’s ocean freight expenses at market economy values. *Pl.’s Br.* at 15. Commerce will use the actual costs to value inputs in non-market economy cases when “a respondent purchased from a market economy supplier in a market economy currency.” *Issues and Decision Memo* at 5 (citing 19 C.F.R. § 351.408(c)(1)). Plaintiff points to a number of instances in the record that cast suspicion on the validity of the invoices Ai Jian submitted during the investigation. *Id.* FMC contends these discrepancies in the re-

cord demand that Commerce investigate further, to verify the legitimacy of the invoices submitted or to use “adverse facts available” under 19 C.F.R. § 351.308(a).

Commerce issued its questionnaire for the period of review on August 22, 2000. Respondents filed a response on October 13, 2000. In that response Ai Jian stated that its market economy ocean freight expenses were paid in market economy currency and that the product was shipped with a market-economy freight company. Ai Jian Section C Response at 2 in *Pl.’s Non-Confidential App Ex. 6*. Commerce, following up on this claim, asked Ai Jian to submit additional documentation:

For the invoices stated above in 5.a., provide a complete paper trail of documentation demonstrating that the international freight charges are set by market-economy carriers and paid for in a market economy currency. Such documentation should include but is not limited to:

- contract(s) between Ai Jian and the shipping company;
- invoices;
- shipping documents such as bills of lading, airway bills, and delivery orders; and
- records of payment such as canceled checks, letters of credit, debit/credit memos, wire transfers, promissory notes, bank deposit slips, and/or bank statements.

Nov. 28, 2000 Commerce Letter to White & Case at 3–4 in *Pl.’s Non-Confidential App. Ex. 7*.

In response to this request, Ai Jian submitted additional documentation. See *Issues and Decision Memo* at 5. Significantly, it also changed some elements of its original claim. Instead of claiming the goods were shipped by a single company, it submitted four invoices from two different companies. *Id.* at 3. Neither company matched the description of the company Ai Jian initially claimed carried the goods. See *Pl.’s Br.* at 17. Two of the invoices were dated eleven months after the payment dates that Ai Jian reported to Commerce. See *Issues and Decision Memo* at 3. Plaintiff claims that the two mistaken dates, and the switch in the company that Ai Jian claims carried the goods, indicates evidence that the invoices were fictitious. See *Pl.’s Br.* at 19. FMC argues that once such evidence raised a “reasonable suspicion,” Commerce had a duty to further investigate the veracity of the invoices beyond the documents submitted. *Pl.’s Br.* at 21 (citing *U.S. Steel Group v. United States*, 25 CIT \_\_\_, \_\_\_, 177 F. Supp. 2d 1325 (CIT 2001)).

The government responds that Commerce “confirmed the validity of the documents by a thorough analysis of documentary and testimonial evidence surrounding the contested invoices.” *Def.’s Br.* at 29. To establish the validity of the invoices Commerce evaluated the

copies of the pages from [Ai Jian’s] expenses sub-ledger demonstrating that it recorded the freight expenses in question in its accounting system within a few days of making the payment to the freight supplier.

*Issues and Decision Memo* at 5. Further,

Ai Jian provided documents showing payment for these ocean freight transactions could be traced from the relevant foreign currency exchange vouchers issued by a commercial bank, to Ai Jian's internal accounting vouchers and operating expense sub-ledger and bank deposit sub-ledger using the sales invoice numbers.

*Id.* In addition, Commerce found that the "payment for ocean freight for these invoices can also be traced from Ai Jian's bank deposit sub-ledger to Ai Jian's bank statement, prepared by the Bank of China." *Id.*

Indeed, with the exception of the dates shown on documents generated by outside parties, all of the documents provided by Ai Jian have been internally consistent and are traceable to actual accounting records. Whatever the causes of the incorrect dates on the two invoices in question, the other information submitted by Ai Jian sufficiently demonstrates that the firm actually incurred and paid for the expenses.

*Id.* at 5.

It is clear from the record that, contrary to FMC's assertion, Commerce did not rest its evaluation on the invoices themselves, but requested additional information. The additional information, while not as complete as FMC would require, provided substantial evidence for Commerce to conclude that the market economy rates for shipping were actually paid by Ai Jian. The court agrees with Plaintiff that in cases where there is reasonable suspicion of wrongdoing Commerce must evaluate further. *See U.S. Steel*, 177 F. Supp. 2d at 1331 (citing *Zenith Elec. Corp. v. United States*, 15 CIT 394, 406-07, 770 F. Supp. 648, 659 (1991)). Here, Commerce did evaluate further and, based on substantial evidence, has verified that Ai Jian paid market economy rates for ocean freight.

FMC argues that the two suspicious invoices, even if verified by Commerce, still demand that Commerce use total or at least partial adverse facts available. *See* 19 C.F.R. § 351.308(a).<sup>1</sup> To support the use of total adverse facts Plaintiff cites *Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from the Republic of Hungary* ("*Sulfanilic Acid*"), 58 Fed. Reg. 8,256 (Feb. 12, 1993). In the *Sulfanilic Acid* case, Commerce found a document during an on-site inspection that indicated an attempt by the respondent to fabricate its submitted documents. Commerce decided that in order to maintain the integrity of the questionnaire process, it could not countenance such a blatant attempt at deception. Therefore, it substituted best information available for all the information submitted by the respondent. *Id.* at 8,257. In this case, however, Commerce merely had two invoices that were misdated. The

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<sup>1</sup>In the relevant portion the regulation reads:

a) Introduction. The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. If the Secretary finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Secretary may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

improper date could have been the result of a clerical error or intentional deception. To determine if the dates were a minor and correctable problem, or significant and indicative of intentional misrepresentation, Commerce demanded and received from Ai Jian supporting documentation. Based on this documentation, Commerce determined that the invoices were valid and proper with the exception of the dates. In the *Sulfanilic Acid* case, there was substantial evidence that the documents were fraudulent. In this case, there was only a reasonable suspicion—disproved with substantial evidence gathered by Commerce—that the invoices might be fictitious. Plaintiff fails to grasp this distinction and risks making every clerical mistake discovered in an investigation grounds for the application of adverse facts available pursuant to 19 C.F.R. § 351.308(a).

Plaintiff's last objection to Commerce's third review final results is that, even if the ocean freight documentation is authentic and reliable, there is still no evidence of actual payment to the carriers. *Pl. 's Br.* at 24. Plaintiff asks that in the absence of proof of payment Commerce be required to use partial adverse facts in granting Ai Jian an adjustment. Plaintiff cites to *Sweaters Wholly or in Chief Weight of Man-Made Fiber from Taiwan: Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 58 Fed. Reg. 32,644 (June 11, 1993) ("*Sweaters*"). In that case, Commerce applied best information available to calculate certain costs. It explained what kind of information it sought and what it deemed lacking in the respondent's submissions:

We were unable in every instance to confirm that an actual payment had been made from Jia Farn to the yarn supplier. Although we saw evidence of payments coming out of Jia Farn's bank account, we could not confirm to whom these payments were made. We did see receipts from yarn suppliers, but we could not confirm that the payment for the yarn was made from a Jia Farn bank account. We also encountered much difficulty in our attempts to match the amount of an invoice with the bank disbursements, because Jia Farn makes multiple payments for most invoices, and we were not able to reconcile multiple payments from the bank accounts to invoice amounts.

*Id.* at 32,649.

Unlike in the *Sweaters* case, in this case Commerce was able to trace the invoices to particular bank withdrawals, which were confirmed by Ai Jian's bank statements. See *Issues and Decision Memo* at 5. As a result, Commerce found that the evidence "sufficiently demonstrates that the firm actually incurred and paid for the expenses." *Id.* As discussed above, that finding was based on substantial evidence.

#### V. CONCLUSION

For the reasons detailed above, Plaintiff's Motion for Judgment upon an Agency Record is denied, and the case is dismissed. Judgment will be entered accordingly.

## [PUBLIC VERSION]

(Slip Op. 03–16)

CHINA NATIONAL MACHINERY IMPORT & EXPORT CORP., PLAINTIFF *v.*  
UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 01–01114

[Plaintiff's Motion for Judgment upon an Agency Record is denied in part, granted in part, and the case is remanded.]

(Decided February 13, 2003)

*Crowell & Moring L.L.P.*, (*Jeffrey L. Snyder*), *Alexander H. Schaefer*, for Plaintiff.  
*Robert D. McCallum, Jr.*, Assistant Attorney General, United States Department of Justice, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, *Lucius B. Lau*, Assistant Director, (*Ada E. Bosque*), Trial Attorney; *Scott D. McBride*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.  
*Stewart and Stewart*, *Terence P. Stewart*, (*Wesley K. Caine*), *Amy A. Karpel*, for Defendant-Intervenor.

## OPINION

## I. INTRODUCTION

BARZILAY, *Judge*: Before the court is Plaintiff China National Machinery Import & Export Corporation's ("CMC") Motion for Judgment upon an Agency Record pursuant to USCIT R. 56.2. CMC challenges certain aspects of the United States Department of Commerce's ("Commerce" or "Defendant") determination in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1999–2000 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 Fed. Reg. 57,420 (Nov. 15, 2001) ("*Final Results*"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

## II. BACKGROUND

Plaintiff CMC is an exporter of tapered roller bearings and parts thereof, finished and unfinished ("TRBs"), from the People's Republic of China ("PRC" or "China") to the United States. The antidumping duty order concerning TRBs from the PRC was issued on May 27, 1987. *See Tapered Roller Bearings from the People's Republic of China; Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 19,748 (May 27, 1987). Commerce designated the PRC as a non-market economy ("NME") country.<sup>1</sup> *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Preliminary Results of 1999–2000 Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Intent Not to Revoke Order in*

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<sup>1</sup> An NME country is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (1999). There is no dispute here as to the PRC's NME status.

Part, 66 Fed. Reg. 35,937, 35,938 (July 10, 2001) (“*Preliminary Results*”). At issue in this case are the 1999–2000 sales of TRBs from the PRC, which constitute sales made during the thirteenth administrative review of the antidumping duty order (“POR”). Specifically, CMC challenges Commerce’s rejection of the actual market prices that CMC paid for steel used in the production of the TRBs, in favor of using surrogate values for steel in the final calculation of normal value (“NV”) to determine dumping margins.<sup>2</sup>

On July 7, 2000, Commerce published the preliminary results of the twelfth administrative review, which showed a zero dumping margin for CMC. See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China; Preliminary Results of 1998–1999 Administrative Review, Partial Rescission of Review, and Notice of Intent to Revoke Order in Part*, 65 Fed. Reg. 41,944, 41,949 (July 7, 2000). On July 31, 2000, Commerce initiated the thirteenth administrative review. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 65 Fed. Reg. 46,687 (July 31, 2000), amended by 65 Fed. Reg. 48,968 (Aug. 10, 2000). On February 26, 2001, Commerce published the amended final results of the twelfth administrative review, which reflected a jump from zero to 0.82% (despite remaining *de minimis*)<sup>3</sup> of CMC’s dumping margin determined in the preliminary. See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China; Amended Final Results of 1998–1999 Administrative Review and Determination to Revoke in Part*, 66 Fed. Reg. 11,562, 11,564 (Feb. 26, 2001). Commerce changed its methodology regarding the prices for steel input in mid-review in the twelfth administrative review.<sup>4</sup>

On July 10, 2001, Commerce published the preliminary results of the thirteenth administrative review. See *Preliminary Results*. Commerce found a 4.79% dumping margin for CMC in this preliminary investigation and therefore denied CMC’s revocation request. See *id.* at 35,941. On November 15, 2001, Commerce published the final results and found a 4.64% dumping margin for CMC. See *Final Results* at 57,422. Commerce’s reasons for its determinations are found in the accompanying *Issues and Decision Memo for the 1999–2000 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China; Final Results* (“*Issues and Decision*”).

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<sup>2</sup>“The term ‘dumping margin’ means the amount by which the normal value exceeds the export price \*\*\* of the subject merchandise.” 19 U.S.C. § 1677(35)(A). “Subject merchandise” is merchandise subject to an antidumping investigation, review or order. § 1677(25). “Normal value” is “the price at which the [subject merchandise or its equivalent] is first sold (or \*\*\* offered for sale) for consumption in the exporting country.” § 1677b(a)(1)(B)(i); § 1677(16). “The term ‘export price’ means the price at which the subject merchandise is first sold (or agreed to be sold) \*\*\* in the United States.” § 1677a(a). The dumping margin is thus the difference between the domestic price and the United States price of the subject merchandise. In the case of an NME exporting country, the domestic price will not be market determined, and the normal value must accordingly be constructed. The statute provides that the values for factors of production used in the construction of normal value for exports of an NME country will be those of a market economy country of comparable economic development, the so-called surrogate. See § 1677b(c).

<sup>3</sup> “[A] weighted average dumping margin is *de minimis* if [Commerce] determines that it is less than 2 percent ad valorem or the equivalent specific rate for the subject merchandise.” 19 U.S.C. § 1673b(b)(3).

<sup>4</sup> The results of the twelfth administrative review of the antidumping duty order (concerning 1998–1999 sales) are challenged in a separate action before another judge of this Court. The issues raised in both actions are similar as they pertain to the same methodology Commerce employed in both the twelfth and thirteenth administrative reviews.



*Memo*”), A-570-601, Pub. Doc. DAS I/1:JG (Nov. 7, 2001), in app. 14 to *Pl.’s Mem. in Supp. of Mot. for J. upon an Agency R.* (“*Pl.’s Br.*”). As it cannot meet the standard of three consecutive years of sales at not less than fair value, see 19 C.F.R. § 351.222(b)(1)(i)(A) (2000), CMC remains subject to the antidumping duty order regarding TRBs from the PRC.

The merchandise at issue here is cups and cones which CMC sold in the United States. *Tr.* at 10:21-25 to 11:1-6.<sup>5</sup> To manufacture cups and cones, CMC used hot-rolled alloy steel bar which it imported from another country paying in market currency.<sup>6</sup> *Pl.’s Br.* at 9. CMC thus challenges Commerce’s use of surrogate values for its hot-rolled alloy steel bar input instead of the actual price it paid. There is no indication on the record, nor is there an argument in the parties’ briefs that CMC and its supplier are affiliated. The exporting country is a market economy country. Normally, to construct NV for the final product, Commerce uses actual prices which an NME producer pays for the input from a market economy country since actual market prices are the best approximation of the input’s value. See 19 C.F.R. § 351.408(c)(1). However, in this case, both in the final stage of the twelfth administrative review and in the entire thirteenth administrative review, Commerce declined to use the actual prices CMC paid to the supplier for its steel because it claimed it had a “reason to believe or suspect” that the supplied steel was benefitting from subsidies, and the actual prices were thus distorted. See *Preliminary Results* at 35,940; *Issues and Decision Memo* at 9. To support its finding that the steel was subsidized, Commerce relied on an internal confidential memorandum, *Market Economy Steel Memo* (Nov. 7, 2001), in app. 4 to *Pl.’s Br.*

The *Market Economy Steel Memo* lists various affirmative antidumping and countervailing duty findings applying to various steel products from the market economy country at issue.<sup>7</sup> Also listed in the *Market Economy Steel Memo* is a negative finding from 1999 relating to one particular steel product, [[ ]], from the market economy country: *Final Negative Countervailing Duty Determination: [[ ]]* (“*Final Negative Determination*”). There are no specific antidumping or countervailing duty findings regarding the hot-rolled alloy steel bar that is at issue here. See *Market Economy Steel Memo*; *Tr.* at 11:7-11. However, during these antidumping or countervailing duty investigations, Commerce “discovered \* \* \* not company specific” but generally available subsidies to steel producers in the concerned country, including directed credit, export industry facility loans, short-term export financing, and investment tax credits. *Market Economy Steel Memo*. Commerce main-

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<sup>5</sup> On November 14, 2002, oral argument was held before this court. “*Tr.*” refers to the transcript of this oral argument.

<sup>6</sup> CMC imported hot-rolled alloy steel bar from [[ ]]. The name of the exporting country and the identity of CMC’s supplier are confidential and set in double brackets. During the POR, CMC’s shipments to the United States also included assembled TRBs with cups, cones, rollers, and cages together. *Pl.’s Br.* at 9. To manufacture cages, CMC’s supplier used cold-rolled steel sheet imported from [[ ]] again paying in market currency. *Id.* To manufacture rollers, CMC used cold-rolled steel bar obtained domestically in the Chinese market. *Id.*

<sup>7</sup> For example, Commerce found in 1999 that [[ ]] exports from the exporting country in question were being dumped in the United States. In addition, in 2000 and 1999, respectively, Commerce determined that [[ ]] exports were being subsidized. There is also an affirmative preliminary dumping finding by the PRC of [[ ]] from that country.

tains without further elaboration that “in two of the three recent [pertinent] investigations, [these general subsidies] are greater than *de minimis*.” *Tr.* at 16:2–4. There is no record evidence of a generally available subsidy verified in the case of hot-rolled alloy steel bar from the country in question as Commerce has never specifically investigated this merchandise. *See Market Economy Steel Memo*. In addition, Commerce never specifically verified whether CMC’s supplier had ever taken advantage of any generally available subsidies for this or any other steel product. *See Tr.* at 17:21–25 to 18:1–16. Commerce nevertheless believes that CMC’s supplier may have (or must have) benefitted from generally available subsidies resulting in a distortion in the prices of hot-rolled alloy steel bar and, therefore, such prices cannot properly be used in the NV calculations for the cups and cones CMC sold in the United States. The contention is that “as a matter of commonsense, we can assume that no one is going to leave money on the table. [Companies] are going to take advantage of a program that’s out there and exists.” *Tr.* at 30:24–25 to 31:1–3.

Given the designation of the PRC as an NME country, Commerce resorted to surrogate country analysis pursuant to its authority under 19 U.S.C. § 1677b(c)(4).<sup>8</sup> Accordingly, Commerce selected India as surrogate and used adjusted weighted-averages of Japanese export prices to India for hot-rolled alloy steel bar based on the Japanese Ministry of Finance statistics. *See Preliminary Results* at 35,940. Commerce explained the selection of India as the surrogate country by pointing out that India was at a comparable level of economic development with the PRC and was the most significant producer and exporter of TRBs among other suitable countries, such as Pakistan, Indonesia, Sri Lanka, and the Philippines.<sup>9</sup> *See Selection of a Surrogate Country and Steel Value Sources Memo* at 3 (July 2, 2001) (“*Surrogate Country Memo*”), in app. 14 to *Pl.’s Br.*; *see also* 19 C.F.R. § 351.408(b) (basing comparability on *per capita* GDP). Finding India’s own import statistics “unreliable,” however, Commerce instead chose Japanese export data to India as “the best data” because “the Japanese tariff category [was] the narrowest category which could contain bearing quality steel, and because it [was] consistent with values contained in our U.S. benchmark category.” *Surrogate Country Memo* at 3; *see also Def.’s Mem. in Opp. to Pl.’s Mot. for J. upon an Agency R.* at 4 (“*Def.’s Br.*”).

After the preliminary results were released, CMC submitted rebuttal evidence to Commerce in the form of a letter from its supplier which denied the existence of any subsidies or financial assistance, direct or indirect, from its government in its production of steel sold to CMC. *See Pl.’s*

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<sup>8</sup>Section 1677b(c)(4) provides that:

[Commerce], in valuing factors of production \* \* \*, shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—

(A) at a level of economic development comparable to that of the nonmarket economy country, and  
(B) significant producers of comparable merchandise.

<sup>9</sup>Even though in the briefs submitted to this court Plaintiff never fully explained nor argued the point, Plaintiff maintains that if any surrogate were to be used Indonesia would have been a better choice. *See Tr.* at 14:6–22. Plaintiff’s claim is that Indonesian prices would not have exceeded the benchmark range as much as Indian values did. *See id.*

*Br.* at 10; *Tr.* at 12:8–11. CMC charges that Commerce ignored this evidence submitted by CMC. *See Pl.’s Br.* at 26. Commerce counters that the letter was insufficient to “refute[] [Commerce’s] reason to believe or suspect subsidization” since it was unsupported by “sales, financial, or other empirical economic information demonstrating the supplier’s prices were not subsidized.” *Issues and Decision Memo* at 8; *see also Tr.* at 13:17–19. “The statement also lack[ed] any specificity, particularly as it [did] not indicate the basis upon which the supplier [made] its statement.” *Issues and Decision Memo* at 8. Commerce further argues that, in addition to being general, the letter was not “directed to Commerce. There [was] no indication \* \* \* of what \* \* \* the duties and responsibilities of the letter writer [were] and why he would have knowledge of what subsidies the company did or did not take advantage of.” *Tr.* at 23:17–22. The letter also consisted of “two sentences,” *Tr.* at 24:4, and was not “in the form of an affidavit,” *Tr.* at 33:13–14.<sup>10</sup>

On January 11, 2002, CMC filed its complaint (“*Compl.*”) with this court. First, CMC challenges in general Commerce’s use of surrogate values in place of actual prices paid by CMC for the input. *Compl.* ¶ 6–A. Second, CMC challenges in particular Commerce’s use of prices of steel imported from Japan to India to value cups and cones. *Compl.* ¶ 6–B. In addition, CMC challenges Commerce’s adjustment of the Japanese prices for freight and insurance costs which were not included in the prices. *Compl.* ¶ 6–C. CMC claims Commerce’s determinations are “arbitrary, capricious, unsupported by substantial evidence on the record, and [are] otherwise not in accordance with law.” *Compl.* ¶ 6. The Timken Company (“Timken”) is the Defendant-Intervenor in this case.

### III. DISCUSSION

The antidumping duty statute requires Commerce to use “the best available information” concerning the values for factors of production from a market economy in the NV calculations for product exported from an NME country. 19 U.S.C. § 1677b(c)(1) (1999).<sup>11</sup> “The statute does not define the phrase ‘best available information.’” *Luoyang Bearing Factory v. United States*, 26 CIT \_\_\_\_, \_\_\_\_, Slip Op. 02–118 at 4 (Oct. 1, 2002). CMC argues that the statutory mandate to use the best available information directs Commerce to utilize “actual prices paid to market economy suppliers [over] surrogate values.” *Pl.’s Br.* at 15. As support, CMC relies on *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994), which noted that “[w]here we can determine that a [sic] NME producer’s input prices are market determined,

<sup>10</sup> The letter titled “Subsidy Statement,” addressed “To whom it may concern,” dated August 24, 2001, and signed by the general manager of the company’s overseas sales department is found in appendix 6 of *Pl.’s Br.* It reads in its entirety:

We have reviewed the participation of [[]] in the programs the US Department of Commerce has considered in the past to constitute countervailable subsidies within the meaning of the US countervailing duty law. Upon review, [[]] did not receive benefits from any of those programs in our sales to China.

<sup>11</sup> Section 1677b(c)(1) in pertinent part provides that:

[T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law” (quoting Commerce’s determinations in the same case, *Oscillating Fans and Ceiling Fans from the People’s Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Oct. 25, 1991) (final determination)). *Pl.’s Br.* at 16; see also *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382–83 (Fed. Cir. 2001) (echoing *Lasko’s* reasoning).

CMC further argues that Commerce’s own regulations compel the use of actual market values over surrogate values. See *Pl.’s Br.* at 17. The applicable regulation is 19 C.F.R. § 351.408(c)(1), which states that “where a factor is purchased from a market economy supplier and paid for in a market economy currency, [Commerce] normally will use the price paid to the market economy supplier” (emphasis added). CMC contends that the “only” exception to this rule is “where the quantity of the input purchased was insignificant.”<sup>12</sup> *Pl.’s Br.* at 17–18; *Pl.’s Reply to Def.’s Br.* at 3.

Commerce responds that the antidumping duty statute does compel Commerce to use “the best available information,” but not necessarily market values. *Def.’s Br.* at 10. Commerce argues that it has “broad discretion to determine the ‘best available information’ in a reasonable manner upon a case-by-case basis.” *Id.* at 11. Commerce further argues that “Congress instructed Commerce to avoid using any prices ‘which it has reason to believe or suspect may be dumped or subsidized prices.’” *Def.’s Br.* at 12 (quoting H.R. Conf. Rep. No. 100–576 at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623 (“*House Report*”). Timken adds to this argument by observing that “Congress did not intend for Commerce to conduct formal investigations before rejecting unfair prices.”<sup>13</sup> *Def.-Intervenor’s Resp. to Pl.’s Mem. in Supp. of Mot. for J.*

<sup>12</sup> The court notes that, as support for this proposition, CMC mistakenly quotes *Rules and Regulations: Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (May 19, 1997) (“*Final Rule*”), which document contains explanations of Commerce’s new rules revised in conformity with the Uruguay Round Agreements Act, including 19 C.F.R. § 351.408(c)(1). According to CMC, the *Final Rule* states on its page 27,413 that “[t]he only situation in which [the Department] would not rely on the price paid by an NME producer to a market economy supplier is where the quantity of the input purchased was insignificant.” *Pl.’s Br.* at 17–18 (emphasis in the original). Given that this quote is one of the cornerstones of its argument, CMC’s mistake is unfortunate. The *Final Rule* merely states on its page 27,366 that “as noted in the AD Proposed Regulations, 61 [Fed. Reg. 7308,] 7345, we would not rely on the price paid by an NME producer to a market economy supplier if the quantity of the input purchased was insignificant.” See also *Proposed Rules: Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7345 (Feb. 27, 1996) (“where the amount purchased [by an NME producer] from a market economy supplier is insignificant, [the] price [paid to the market economy supplier] may be disregarded.”). Without more, the “only” language simply cannot be read into the *Final Rule* and, accordingly, into Commerce’s understanding of its own regulations as reflected in the *Final Rule*. The court notes, however, that the same language appears in another case. See *Certain Helical Spring Lock Washers from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 61,794, 61,796 (Nov. 19, 1997) (containing the same quote supplied by CMC and citing to the *Final Rule* at 27,366). That is, in at least one occasion, Commerce agreed with Plaintiff that the only situation that permitted a deviation from the use of readily available market prices was when the quantity of input sold by the market supplier was insignificant. What Commerce said or did in another case does not, however, have the same persuasive value in this case as a pronouncement in the *Final Rule* would have had.

<sup>13</sup> The *House Report* further stated that:

However, the conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time. In addition, Commerce should seek to use, if possible, data based on production of the same general class or kind of merchandise using similar levels of technology and at similar levels of volume as the producers subject to investigation.

*House Report* at 590–91 (emphasis added).

upon an Agency R. at 18. Finally, with respect to 19 C.F.R. § 351.408(c)(1), Commerce contends that while, through the inclusion of the word “normally,” the “regulation evinces a preference for the use of market values, that preference does not require Commerce to use market values in all circumstances.” *Def.’s Br.* at 17. Commerce concludes that “[h]ere, the use of market prices [was] not appropriate because those prices [were] distorted.” *Id.*

CMC objects to Commerce’s resort to the “reason to believe or suspect” standard under these facts. *See Pl.’s Br.* at 20. According to CMC, the *House Report* from which Commerce derived the “reason to believe or suspect” standard relates only to a selection among surrogate values, not to the selection of surrogate values over market prices. *See id.* at 20–21. Thus, Plaintiff urges that the “reason to believe or suspect” standard would not be applicable where market prices are available. *See id.*

*A. Commerce’s use of certain surrogate prices over actual prices of inputs in NV calculations under the statute.*

“The court’s role is not to determine whether the information chosen by Commerce is the ‘best’ actually available, but whether the choice is supported by substantial evidence and is in accordance with law.” *Nova-chem, Inc. v. United States*, 16 CIT 782, 786, 797 F. Supp. 1033, 1037 (1992) (citations omitted). Accordingly, the first issue before the court is whether Commerce’s use of surrogate input values instead of the actual prices paid by an NME producer to a market economy supplier is in accordance with law where Commerce has “reason to believe or suspect” that the actual prices are distorted.

The court agrees with Commerce that nothing in the antidumping duty statute directs Commerce to employ actual prices paid to a market economy supplier by an NME producer in NV calculations. Under the antidumping duty statute, “Commerce’s duty [is] to determine margins as accurately as possible, and to use the best information available to it in doing so.” *Lasko*, 43 F.3d at 1443; *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1190 (Fed. Cir. 1993); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Commerce has especially “wide discretion in the valuation of factors of production.” *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). The statute “simply does not say-anywhere-that the factors of production must be ascertained in a single fashion.” *Lasko*, 43 F.3d at 1446; *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486, 491 (2000), *aff’d*, 268 F.3d 1376 (2001). Commerce’s methodology in selecting values for factors of production will be upheld, as long as such methodology does not contravene “the purpose of the statute, [which is] to construct the product’s normal value as it would have been if the NME country were a market economy country.” *Rhodia, Inc. v. United States*, 25 CIT \_\_\_\_, \_\_\_\_, 185 F. Supp. 2d 1343, 1351 (2001) (citations omitted). The statutory term “best available information” is at best an ambiguous term. *See* § 1677b(c)(1). When the statute is ambiguous on a point, the court must uphold an

agency's reasonable constructions of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In particular, "statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); see also *Allied-Signal*, 996 F.2d at 1191 (observing that "because Congress has 'explicitly left a gap for the agency to fill' in determining what constitutes the best information available [(which phrase appeared in 19 U.S.C. § 1677e(c) (1988)), Commerce's] construction of the statute must be accorded considerable deference" under *Chevron*).

Contrary to CMC's contention, the *Lasko* decision cannot be construed as requiring Commerce to employ actual prices (paid by an NME producer to a market economy supplier) over surrogate values in every situation. In *Lasko*, Commerce won the right to use market prices instead of surrogate values for factors of production in NV calculations on the rationale that "accuracy, fairness, and predictability are enhanced by using those prices." *Lasko*, 43 F.3d at 1446. Where actual prices reflect true market values, not to employ such prices would indeed be contrary to Commerce's mandate of estimating antidumping duty "margins as accurately as possible." *Id.* at 1443. If the prices CMC paid to its supplier for the steel input were artificially low, however, due to subsidies it was receiving from the government, then the calculated NV for the end product, TRBs, would be artificially low, suppressing the dumping margins of CMC. Thus, if CMC were indeed dumping in the United States, that fact would have been concealed by the artificially low NV. If actual "market" prices are distorted in such a way, Commerce's use of such prices would undermine "accuracy, fairness, and predictability," *id.* at 1446, in the calculation of margins and contravene the antidumping and countervailing duty statute, the purpose of which is to correct for the effect dumping and subsidies have on prices and competition.

Moreover, nothing in the applicable regulations compels Commerce to choose actual prices over surrogate values. As Commerce urges, 19 C.F.R. § 351.408(c)(1) merely indicates a preference for market prices. That is, while Commerce will use market values under normal circumstances, under certain circumstances Commerce may choose not to do so. The court rejects the argument that Commerce may deviate from this practice only when quantities of input purchased are insignificant. Section 351.408(c)(1) itself does not supply the exceptional circumstances under which Commerce may disregard market prices. In explaining § 351.408(c)(1), Commerce had indicated that one situation where it "would not rely on the price paid by an NME producer to a market economy supplier [is where] the quantity of the input purchased was insignificant." *Rules and Regulations: Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (May 19, 1997). That cannot,

however, be the only situation when a deviation from the normal practice of using market prices is permissible.

It is true, as CMC urges, that the “reason to believe or suspect” standard articulated in the *House Report* explicitly refers only to a selection among surrogate prices, as opposed to a choice between surrogate and market values. This Court and the United States Court of Appeals for the Federal Circuit have, in addition, upheld Commerce’s use of the “reason to believe or suspect” standard in the context of a choice among surrogate values and affirmed Commerce’s refusal to use distorted surrogate values. See *Nation Ford*, 166 F.3d at 1377–78; *Rhodia*, 185 F. Supp. 2d at 1352; *Technoimportexport, UCF Am. Inc. v. United States*, 16 CIT 13, 17, 783 F. Supp. 1401, 1405 (1992). “Evidently, the main consideration is the unreliability of the price information due to the unknown dumping margin if any.” *China Nat’l Metals & Minerals Imp. & Exp. Corp. v. United States*, 11 CIT 859, 864, 674 F. Supp. 1482, 1486 (1987). Such a consideration would, however, also be pertinent whenever market values are involved. There are also policy concerns on each side of this issue. The policy in favor of determining margins as accurately as possible weighs against further use of the “reason to believe or suspect” standard. On the other hand, given that the overarching purpose of the antidumping and countervailing duty law is to counteract dumping and subsidies, the court cannot conclude that Congress would condone the use of any value where there is “reason to believe or suspect” that it reflects dumping or subsidies. “[S]urrogate country values are, at best, an *estimate* of the true value of the factors of production” and, therefore, not precise. *Shakeproof*, 268 F.3d at 1382 (emphasis in original) (citation omitted). However, if Commerce had “reason to believe or suspect” that steel used by CMC in the production of the TRBs sold in the United States were subsidized, Commerce may employ surrogate values where it determines that they are the best information under the statute.<sup>14</sup>

<sup>14</sup> Commerce may also choose among surrogates which fit the requirements of § 1677b(c)(4). See *Shieldalloy Metallurgical Corp. v. United States*, 20 CIT 1362, 1368, 947 F. Supp. 525, 532 (1996) (“Commerce does not need to prove that its methodology was the only way, or even the best way to calculate surrogate values for” subject merchandise.). Such choices will be upheld as long as they are reasonable. See *Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999). CMC failed to fully articulate to this court why Indonesia would have been a better choice as a surrogate than India, other than claiming that Indonesian values would not have exceeded the U.S. benchmark range as much as Indian values did. Commerce found that both India and Indonesia were of comparable economic development to the PRC and explained that India was selected over Indonesia (and over other suitable surrogates) because it was “the most significant producer and exporter of tapered roller bearings.” *Selection of a Surrogate Country and Steel Value Sources Memo* at 2 (July 2, 2001), in app. 14 to *Pl.’s Br.* Commerce’s action was consistent with the statutory mandate under § 1677b(c)(4), to choose a “significant producer” of the merchandise as a surrogate. Therefore, Commerce was within its discretion to use Japanese export data to India, as opposed to any Indonesian values. Cf. *Luoyang Bearing Factory v. United States*, 26 CIT \_\_\_\_, \_\_\_\_, Slip Op. 02–118 at 4 (Oct. 1, 2002) (pointing out that Commerce has discretion to switch from primary to secondary surrogate data). Similarly, Commerce may adjust data by adding ocean freight and marine insurance costs (“F&I”), as long as such adjustment is reasonable. Here, the base values Commerce used were F.O.B. Japanese export prices. “F.O.B.” or “Free-On-Board” prices do not include F&I whereas “C.I.F.” or “Cost-Insurance-and-Freight” prices do. See International Chamber of Commerce, *Incoterms 2000* 49, 65 (1999). The F&I data used in the adjustment was that from the PRC to the United States west coast. See *Issues and Decision Memo* at 14. Commerce claims that this data was “the best available information [that] most closely approximate[d] the shipping distance between Japan and India.” *Id.* CMC argues that the F&I used in the adjustment was approximately three times the difference between F.O.B. and C.I.F. Japanese values and, therefore, such adjustment was unreasonable. See *Pl.’s Br.* at 28–29. Even though subtracting F.O.B. values from C.I.F. values may be one method of extracting F&I, it is not the only method, and it is not the method Commerce chose to employ here. Plaintiff has not shown to this court why Commerce’s adjustment methodology is unreasonable. We need not, however, decide this difficult issue as Commerce’s basic decision must be remanded as unsupported by substantial evidence.

*B. Commerce's use of the reason to believe or suspect standard in the case of certain subsidies is unsupported by substantial evidence.*

The second question before the court is whether, in this case, Commerce's actions are supported by substantial evidence that would have given Commerce "reason to believe or suspect" that the steel used by CMC in the production of the TRBs sold in the United States was subsidized.

The "reason to believe or suspect" standard that is argued here has no statutory definition. In attempting to define a similar phrase, "reasonable grounds to believe or suspect," which appears in 19 U.S.C. § 1677b(b)(1) (1999),<sup>15</sup> this Court observed that "in order for reasonable suspicion to exist there must be 'a particularized and objective basis for suspecting' the existence of certain proscribed behavior, taking into account the totality of the circumstances—the whole picture." *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 247, 575 F. Supp. 1277, 1280 (1983) (quoting from criminal law cases that analyzed the "reasonable suspicion" standard for searches pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968)). This insistence on "a particularized and objective basis" has been interpreted to mean a "demand for specificity." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981), and also citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320–21 (1978), for the proposition that "probable cause in the administrative law context is established by specific evidence" (emphasis in the original)).<sup>16</sup> Therefore, the "reason to believe or suspect" standard at issue here must be predicated on particular, specific, and objective evidence.

On the other hand, substantial evidence is "more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "For purposes of judicial review, the evidence before this Court is limited to the evidence contained in the administrative record." *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 1353, 1361, 985 F. Supp. 1166, 1173 (1997) (citations omitted). In applying the "substantial evidence" standard, "the court affirms [an agency's] factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)).

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<sup>15</sup> "Whenever [Commerce] has reasonable grounds to believe or suspect that sales of [the subject merchandise or its equivalent] for the determination of normal value have been made at prices which represent less than the cost of production of that product, [Commerce] shall determine whether, in fact, such sales were made at less than the cost of production." § 1677b(b)(1).

<sup>16</sup> The court notes that the exact quote from *Marshall* is: "For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an \* \* \* inspection are satisfied with respect to a particular [establishment].'" 436 U.S. at 320 (quotation omitted) (footnote omitted).



Merging the two standards and under the facts of this case, the court will accordingly affirm Commerce's actions if, given the entire record as a whole, there is substantial, specific, and objective evidence which could reasonably be interpreted to support a suspicion that the prices CMC paid to its market economy supplier were distorted. Otherwise, this court may not reweigh the evidence or substitute its own judgment for that of the agency. See *Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989) (citation omitted). Additionally, the agency is presumed to have considered all of the evidence in the record, and the burden is on the plaintiff to prove otherwise. *Roses, Inc. v. United States*, 13 CIT 662, 668, 720 F. Supp. 180, 185 (1989); *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988).

To support its contention that there is substantial evidence in the record, Commerce argues that the discovery of subsidies which are not company specific in the investigations of other steel products gave it reason to infer that CMC's supplier alongside other steel producers in the relevant country may have benefitted from these so-called general subsidies. See *Def.'s Br.* at 15. Commerce further argues that "the letter [from CMC's supplier], at most, created a conflict in the record," to which Commerce was entitled to give "minimal weight." *Id.* at 16.

CMC, on the other hand, points to contradictory evidence. First, "there are no current or prior countervailing duty orders in the United States or in China on the material input in question, hot-rolled bars and rods of bearing quality steel manufactured in [the exporting country]." *Pl.'s Br.* at 25 (citing *Market Economy Steel Memo*). Second, not only the steel input in question, but also CMC's supplier was never investigated in any recent countervailing or antidumping duty investigations. See *id.* Third, "[i]n a recent countervailing duty case on [a steel input from the exporting country, Commerce] made a final negative countervailing duty determination." *Id.* (citing *Final Negative Determination*). According to CMC, this finding would "obviously militate[] against the notion that there are 'industry-wide' subsidies conferring benefits on manufacturers of steel products." *Id.* at 25–26.

CMC is correct. Evidence exists in the record—Commerce's own negative finding for one steel product from the country at issue—compelling the conclusion that all steel products from that country could not have benefitted from general subsidies. See *Final Negative Determination*. This evidence is not merely a contradictory piece of evidence to which Commerce is entitled to give minimal weight. On the contrary, this evidence directly undermines Commerce's justification of using surrogate values in CMC's case. If this specific finding is an anomaly, Commerce must explain to this court why it is an anomaly. Otherwise, Commerce cannot reasonably claim that, if one or two steel products in the exporting country were subsidized, then all must have been because at least one was found by Commerce itself not to have been subsidized. Conjectures are not facts and cannot constitute substantial evidence.

*China Nat'l Arts and Crafts Imp. and Exp. Corp. v. United States*, 15 CIT 417, 424, 771 F. Supp. 407, 413 (1991) (“Guesswork is no substitute for substantial evidence in justifying decisions.”). In this case, it may be that there in fact exists a countervailable subsidy program to support steel producers in the country in question, but CMC’s supplier might not have qualified for this program and, therefore, could not have benefitted from it. There is no indication on this record whether this program is offered across the board to all steel producers in the country, to those of a certain size, to those which manufacture a certain product or set of products, to those in a specific geographical area or so on. Without explaining more of the program and without explaining, for example, who could benefit from the program or whether companies may choose not to participate (for example, because the program comes with certain obligations), the contention that all steel producers must have benefitted from the program is logically unsupportable.

Moreover, even the existence of a sufficiently significant general subsidy program is in question here. This court raised the issue with counsel at oral argument. The numbers that appear in the *Market Economy Steel Memo* that allegedly indicate the existence of a subsidy program appear to be very low numbers. The court was concerned that, even if there is an available steel subsidy program in the country in question, its effects are minimal and do not rise to the level of a distortion which Commerce must address. Neither Commerce in the administrative proceedings, nor counsel at oral argument or in their papers explained the magnitude of these “general” subsidies, i.e., whether they are *de minimis* and whether they, accordingly, must be treated as if they were zero. See *Tr.* at 16:5–11. The *Market Economy Steel Memo* merely states that “the general subsidies found in [[ ]] investigations are greater than *de minimis*.” If this program had no significant effect on the prices CMC paid to its supplier, then there may be no distortion and, therefore, no justification to deviate from the actual input prices.

The court is mindful of the fact that previous administrative reviews of CMC with respect to TRBs yielded zero or *de minimis* dumping margins.<sup>17</sup> Commerce rejected CMC’s actual prices in favor of using surrogate values which are by their nature imprecise. Arguably, Commerce was faced with a difficult choice between potentially distorted actual prices and imprecise surrogate values. Choosing surrogate values resulted in above *de minimis* dumping margins for CMC which were not found when actual prices were used. The court does not question Commerce’s discretion to use surrogate values when it has reason to believe that the actual prices are distorted.<sup>18</sup> However, the alleged distortion in the actual prices must be shown more clearly than present here. The

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<sup>17</sup> The court notes that CMC may have been entitled to revocation by virtue of no dumping for three consecutive years and such revocation may have been prevented by this change of methodology—a result with great detrimental significance.

<sup>18</sup> The court, however, questions whether a simple adjustment could not have corrected this potential and alleged distortion in the actual prices which may have in turn resulted in more accurate dumping margins, instead of discarding the set of actual prices in its entirety. The court also questions whether Commerce did not perform this correction on CMC’s input prices because it was difficult to ascertain the exact magnitude of the distortion.

regulation in question, 19 C.F.R. § 351.408(c)(1), evinces a preference in favor of market prices. While this preference may not rise to the level of a legal presumption, nevertheless, in order to deviate from its own regulation, Commerce must base its decision on a clearer and more substantial record than presented here.

The lack of any specific evidence linking either CMC's supplier or its steel input to any subsidies further undermines Commerce's justification and reasoning to use surrogate values in CMC's case. Neither this specific steel input in question, nor CMC's steel supplier was ever investigated by Commerce. There is no evidence on the record indicating that CMC's supplier benefitted from generally available subsidies, which were incidentally discovered in other investigations.<sup>19</sup> This insistence on specific evidence in CMC's case is consistent with the remedial, not punitive, purpose of the antidumping duty laws. *See, e.g., NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995).

Finally, Commerce's continuous reference to the *Market Economy Steel Memo* to support its determinations in CMC's case does not constitute a "reasoned explanation" that is required under the statute. *See, e.g., Usinor v. United States*, 26 CIT \_\_\_\_, \_\_\_\_, Slip Op. 02-70, 01-10 at 14 (July 19, 2002); *Altx, Inc. v. United States*, 25 CIT \_\_\_\_, \_\_\_\_, 167 F. Supp. 2d 1353, 1360 (2001). Under the statute, Commerce must "include in a final determination \* \* \* an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review \* \* \*, concerning the establishment of dumping or a countervailable subsidy." 19 U.S.C. § 1677f(i)(3)(A). This does not mean that Commerce must "make an explicit response to every argument made by a party, but instead requires that issues material to [Commerce's] determination be discussed so that the 'path of the agency may reasonably be discerned' by a reviewing court." Statement of Administrative Action at 892, accompanying H.R. Conf. Rep. No. 103-826(I), reprinted in 1994 U.S.C.C.A.N. 4040, 4215 (quoting case law). Commerce "must specifically reference in [its] determinations factors and arguments that are material and relevant or must provide a discussion or explanation in the determination that renders evident [Commerce's] treatment of a factor or argument." H.R. Conf. Rep. No. 103-826(I) at 98, reprinted in 1995 U.S.C.C.A.N. 3773. What constitutes an explanation is an "articulat[ion of a] rational connection between the facts found and the choice made." *Queen's Flowers De Columbia v. United States*, 21 CIT 968, 978, 981 F. Supp. 617, 627 (1997) (quotation omitted). Here, Commerce attempted to establish a link between certain "not company specific" subsidies found in other investigations and CMC. However, it is not a reasonable exercise of discretion for Commerce to use a subsidy finding of a past or different investigation and apply it without inquiring further whether such a finding is applicable to the particular set of circumstances at hand. *Cf. Nation Ford Chem.*

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<sup>19</sup> The court notes that CMC's other [ ] supplier, [ ], of other steel was investigated and "the subsidies to [ ] were found to be *de minimis*." *Market Economy Steel Memo*.

*Co. v. United States*, 21 CIT 1371, 1377, 985 F. Supp. 133, 138 (1997), *aff'd*, 166 F3d 1373 (Fed. Cir. 1999) (“[S]ubsidy findings are fact-specific, and circumstances often change;” therefore, “factual findings in past determinations, while often relevant, are not binding in subsequent cases.”). It is “material and relevant” that other merchandise subject to antidumping and countervailing duty orders differs from the input at issue in this case. Accordingly, Commerce must explain its decision sufficiently so that this court can reasonably discern the path of Commerce’s reasoning as to why CMC’s supplier must have benefitted from subsidies discovered elsewhere in the production of hot-rolled alloy steel bar sold to the PRC. The *Issues and Decision Memo* of the thirteenth administrative review simply references the *Market Economy Steel Memo* without much elaboration.<sup>20</sup> *Market Economy Steel Memo* is a five page document with sparse text, reporting (mostly in tables) Commerce’s (and other countries’) dumping and subsidy findings about steel from the market economy country in question without further explanation. The so-called “general” subsidies at issue here are reported in a separate table tabulating various subsidies, such as investment tax credits, short-term export financing and the like, against three steel products, [[ ]].<sup>21</sup> Again, there is no mention of hot-rolled alloy steel bar, the steel product in question here, in the table. The numbers that appear in the table are also presented without explanation.

Therefore, the court remands this case to Commerce to review and augment the administrative record and to explain its determinations adequately. It must demonstrate particular, specific, and objective evidence to uphold its reason to believe or suspect that the prices CMC paid the supplier for the inputs were subsidized. “If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Following the language of the *House Report*, a “formal investigation” may not be necessary here; however, a presentation by Commerce to this court of substantial, specific evidence and an adequate elucidation of reasons for its determinations are essen-

<sup>20</sup> The relevant portions of the *Issues and Decision Memo* state on pages 7 to 9:

CMC \*\*\* contend[s] that the record lacks substantial evidence that the material inputs used to produce the subject merchandise were dumped or subsidized. However, our analysis in TRBs XII[, i.e., the twelfth administrative review,] of CVD findings provides reason in the instant review to believe or suspect that certain market economy prices paid by PRC producers of TRBs for their steel inputs are subsidized. [(citing to *Market Economy Steel Memo*)]

\*\*\* In TRBs XII, [Commerce] conducted an exhaustive analysis of current CVD orders and found that we could reasonably infer that the particular market economy steel used by PRC TRB producers was subsidized. [(citing to *Market Economy Steel Memo*)]

\* \* \* \* \*

\*\*\* [W]e do not consider [the letter from the supplier] as credible as our *Market Economy Steel Memo*.

\*\*\* With regard to the valuation of steel inputs in the instant case, we have examined the available information and find credible, particular, and objective evidence from the *Market Economy Steel Memo* that supports our reason to believe or suspect that certain market economy steel purchased for use in TRBs benefitted unfairly from subsidization. \*\*\*

<sup>21</sup> The court notes that one of these products is the subject of a negative finding by Commerce. See *Final Negative Countervailing Duty Determination*: [[ ]].

tial for the court to uphold Commerce's results in the thirteenth administrative review.

#### V. CONCLUSION

For all the foregoing reasons, the court holds that Commerce's determinations in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1999–2000 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 Fed. Reg. 57,420 (Nov. 15, 2001), are unsupported by substantial evidence and, therefore, should be remanded to the agency for review and action consistent with this opinion.

A separate order will be entered accordingly.

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(Slip Op. 03–20)

E.T. HORN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–11–03124

[On proper classification of the chemical compound dichloroethyl ether, Plaintiff's Motion for Summary Judgment Denied; Defendant's Cross-Motion for Summary Judgment Granted.]

(Decided February 27, 2003)

*Stein, Shostak, Shostak & O'Hara, (Joseph P. Cox) and Heather Litman*, for Plaintiff.  
*Robert D. McCallum, Jr.*, Assistant Attorney General, United States Department of Justice, *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, (*Saul Davis*), Senior Trial Counsel, for Defendant.

#### OPINION

##### I. INTRODUCTION

BARZILAY, *Judge*: The court has before it Plaintiff's Motion for Summary Judgment under USCIT Rule 56 and Defendant's Cross-Motion. The issue in this case is the proper classification of dichloroethyl ether ("DCEE"), a chemical compound imported by Plaintiff, E.T. Horn Company ("Horn"). The United States Customs Service ("Customs") classified the product as an ether of monohydric alcohol, Harmonized Tariff Schedule of the United States ("HTSUS") subheading 2909.19.1090, at duty rates of 5.5 percent and 5.6 percent. Plaintiff contends that DCEE should be classified as a derivative of diethyl ether, HTSUS subheading 2909.11.0000, at a duty rate of 1.0 percent. Disposition of this case rests on whether DCEE is an ether of monohydric alcohol. The court exercises jurisdiction under 28 U.S.C. § 1581(a).

##### II. BACKGROUND

Plaintiff imported DCEE for several years prior to this case being filed. *See Pl.'s Mem. of Points and Authorities in Supp. of Mot. for*

*Summ. J. ("Pl.'s Br.")* at 4. During that time Customs did not dispute Plaintiff's claimed classification of DCEE under HTSUS 2909.11.0000, finding that, as a derivative of diethyl ether, it was properly classifiable under the subheading for diethyl ether. *See id.* Derivatives of a compound are classified under the subheading of that compound according to Subheading Note 1 to Chapter 29 of the HTSUS which states:

Within any one heading of this chapter, derivatives of a chemical compound (or group of chemical compounds) are to be classified in the same subheading as that compound (or group of compounds) provided that they are not more specifically covered by any other subheading and that there is no residual subheading named "Other" in the series of subheadings concerned.

(emphasis in original). A 1996 Customs Laboratory report concluded that DCEE was a symmetrical acyclic ether,<sup>1</sup> and Customs continued to allow classification under 2909.11.000, as a derivative of diethyl ether. *See Pl.'s Br. Ex. 2.*<sup>2</sup>

Despite the decision of Los Angeles Customs to allow the importer's classification, the Customs office in Houston rejected entries of DCEE classified under subheading 2909.11.0000, and, instead, required that Plaintiff enter the goods under subheading 2909.19.1090, as an ether of monohydric alcohol, other than methyl tertiary-butyl ether ("MTBE"). *See Pl.'s Br.* at 4. The relevant portion of the HTSUS (1996) reads as follows:

2909	Ethers, ether-alcohols, ether-phenols, ether-alcohol-phenols, alcohol peroxides, ether peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives: Acyclic ethers and their halogenated, sulfonated, nitrated or nitrosated derivatives:	
2909.11.00	Diethyl ether . . . . .	1%
2909.19	Other:	
2909.19.10	Ethers of monohydric alcohols . . .	5.6%
2909.19.1010	Methyl tertiary-butyl ether (MTBE)	
2909.19.1090	Other	

Plaintiff protested the entries at the Port of Houston by filing a Protest and Application for Further Review on January 3, 1997. *See Pl.'s Br.* at 4. Customs responded by issuing Headquarters Ruling Letter No. 961267 on April 27, 1998, affirming that DCEE should be classified un-

<sup>1</sup>The report states: "The sample, a clear, colorless liquid in a glass bottle labeled 'Dichloroethyl Ether,' is Dichloroethyl Ether, a symmetrical acyclic ether (CAS # 11-44-4)."

<sup>2</sup>The determination of the laboratory report that DCEE is a symmetrical acyclic ether is not dispositive of the question of whether it is an ether of a monohydric alcohol or a derivative of diethyl ether. In fact, a later laboratory report prepared by the New York Customs office, a summary of which is the first attachment of *Def.'s Resp. to the Court's Questions/Letter of July 18, 2002*, states that DCEE "is an ether of a monohydric alcohol," and "conclude[s] that DCCE [*sic*] is a halogenated derivative of an ether of a monohydric alcohol."

der subheading 2909.19, as an “Other” ether of monohydric alcohol. *See id.* at 5.

Plaintiff claims that DCEE is not an ether of monohydric alcohol. Defendant claims that it is an ether of monohydric alcohol. Both parties assert that this issue is ripe for summary judgment because resolving the proper classification of DCEE is one of interpretation of the tariff schedule and not a factual determination as to the chemical nature of DCEE. The court agrees. Summary judgment is appropriate because “there is no dispute concerning the basic characteristics of the subject” merchandise. *Chevron Chem. Co. v. United States*, 23 CIT 500, 502, 59 F. Supp. 2d 1361, 1364 (1999). Summary judgment is appropriate when “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” USCIT R. 56(c); *see also Anderson v. Liberty Lobby*, 477 U.S. 242, 247–48 (1986).

### III. STANDARD OF REVIEW

Classification decisions are presumed to be correct. 28 U.S.C. § 2639(a)(1) (1999). The presumption does not apply when there is no material fact at issue, because the presumption does not carry force with questions of law. *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). When there are no factual issues in the case, the “propriety of the summary judgment turns on the proper construction of the HTSUS, which is a question of law,” subject to de novo review. *Clarendon Marketing, Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998) (noting that legal issues are subject to plenary review by this Court and the Court of Appeals); *see also* 28 U.S.C. § 2640. “To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988) (citations omitted). The court will also consider the reasoning of a Custom’s classification ruling, to the degree the ruling exhibits a “power to persuade” as outlined in *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

### IV. DISCUSSION

#### A. Interpretation of HTSUS Heading 2909 and Note 1.

The first step to a correct decision in this case is determining the meaning of Note 1 of Chapter 29 quoted above. The parties agree that if DCEE is an ether of monohydric alcohol, then Note 1 requires that it be classified under Defendant’s claimed provision: 2909.19.1090. *See Pl.’s Br.* at 8; *Def.’s Mem. in Opp. to Pl.’s Mot. for Summ. J. and in Supp. of Def.’s Cross-Mot. for Summ. J.* (“*Def.’s Br.*”) at 5. If it is not an ether of monohydric alcohol, but a derivative of diethyl ether, then Note 1 dictates that it should be classified as Plaintiff claims along with diethyl

ether under 2909.11.0000. To restate the proposition in terms of Note 1, if DCEE is an ether of monohydric alcohol, it is “more specifically provided for” under 2909.19.1090. If it is not an ether of monohydric alcohol, and is a halogenated derivative of diethyl ether, then it should be classified with the chemical compound of which it is a derivative—diethyl ether. Defendant does concede that DCEE can be a halogenated derivative of diethyl ether, but refutes for purposes of this litigation that these specific entries of DCEE are in fact a derivative of diethyl ether because they are not in fact “made from” diethyl ether. *See Def.’s Br.* at 18 (quoting *McGraw-Hill Dictionary of Scientific and Technical Terms* definition of “derivative” (McGraw-Hill 1979)).

Defendant adds an additional caveat, that if there is a “residual Other” subheading within the heading, then DCEE belongs under that subheading, in this case the same subheading as Customs’ claimed classification of ether of monohydric alcohol other than MTBE—2909.19.1090.

The court agrees with the parties that if DCEE is an ether of monohydric alcohol, then it is not necessary to rely on the instructions contained in Note 1 regarding proper treatment of derivatives under the tariff schedule or how to define the term “residual Other.” If DCEE is not an ether of monohydric alcohol, then the court must determine the meaning of Note 1. Therefore, the next step for determining the proper classification is to ascertain the meaning of ether under the HTSUS. As detailed below, the court finds that DCEE is an ether of a monohydric alcohol; therefore, it need not reach a conclusion regarding the full scope of Note 1.

#### *B. The meaning of “ether” under the HTSUS.*

Having explained the bases for the alternatives for classification of DCEE under HTSUS 2909, the court now turns to the issue of whether DCEE is an ether of monohydric alcohol. As stated above, Plaintiff and Defendant do not agree on whether DCEE is an ether of monohydric alcohol nor do they agree on how to determine exactly what constitutes an ether of monohydric alcohol. In the text which follows, the court explains why it agrees with Defendant’s definition of the term “ether.” In brief, Defendant explains that an ether is an alcohol that has been dehydrated; an element, water, has been removed from the alcohol. *Def.’s Resp. to the Court’s Questions* at 5.<sup>3</sup>

Interpreting the meaning of tariff provisions is consistently viewed as a question of law. *See Bausch & Lomb Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). Determination of the meaning starts with examination of the terms of the heading and any relative section or chapter notes. *See* HTSUS GRI 1. Explanatory Notes are also used to indicate a meaning, although they are not determinative. *See, e.g., Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994).

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<sup>3</sup>The court requested further information from the parties by letter dated July 18, 2002.



When a term is not specifically defined in the HTSUS nor its legislative history, then courts look to the common meaning of the term, often relying on dictionaries and other reference tools. See *Rubie's Costume Co. v. United States*, 26 CIT\_\_\_\_\_, \_\_\_\_\_, 196 F. Supp. 2d 1320, 1327 (2002) (quoting *Medline Indus. Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995)). It is also appropriate to look to the term's commercial meaning. See, e.g., *W.Y. Moberly, Inc. v. United States*, 924 F.2d. 232, 235 (Fed. Cir. 1991).

Plaintiff makes two different arguments to show why DCEE is not an ether of monohydric alcohol. First, Plaintiff contends an ether of an alcohol must contain that alcohol in its structure. Second, Plaintiff claims that DCEE is not an ether of a monohydric alcohol because it is not directly produced from a monohydric alcohol. In its initial brief, it cites to the affidavit of its expert, Dr. Max Thomas Wills.<sup>4</sup> Horn sets out the proposition that an ether of monohydric alcohol must include in its structure a monohydric alcohol. "Thus, the lack of a monohydric or polyhydric alcohol in DCEE precludes DCEE from being an ether of a monohydric or polyhydric alcohol or a derivative thereof." *Pl.'s Br.* at 8, (citing *Wills Aff.* ¶ 10.)<sup>5</sup> In the next round of briefs, Plaintiff contends that DCEE is not an ether of monohydric alcohol because it is not "derived" from 2-chloroethanol, a monohydric alcohol. *Wills Aff. attached to Reply Br.* ("Wills' Reply Aff.") ¶ 11. However, it does concede that DCEE is an "ether of 2-Chloroethanol if it is produced therefrom." *Pl.'s Resp. to Def.'s Statement of Material Facts to Which There Is No Genuine Dispute* ¶ 4. Horn also concedes that when DCEE is produced from 2-chloroethanol it can be by a process of dehydration. *Id.* Plaintiff denies that the DCEE in question is an ether of 2-chloroethanol because it is not produced from 2-chloroethanol, and it is not "structurally related" to 2-chloroethanol. *Wills' Reply Aff.* ¶ 8, 9.

Defendant attacks Plaintiff's conclusion that DCEE is not an ether of monohydric alcohol as having "no legal or authoritative scientific basis of which we are aware." *Def.'s Reply to Pl.'s Opp. to Def.'s Cross-Mot. for Summ. J.* ("Def.'s Reply") at 6.

The court agrees with Defendant that Plaintiff has not sufficiently supported its contention that DCEE is not an ether of monohydric alcohol. This is in contrast to its detailed support for the fact that DCEE is a halogenated derivative of diethyl ether.<sup>6</sup> Plaintiff relies almost entirely on Dr. Wills' affidavits to support its argument about the proper method to determine if an ether is an ether of a monohydric alcohol, and whether DCEE is indeed an ether of monohydric alcohol under that method.<sup>7</sup>

<sup>4</sup> Professor of Chemistry, California Polytechnic State University, San Luis Obispo. *Wills Aff.* ¶ 1.

<sup>5</sup> Plaintiff makes a subsidiary argument related to "structural relationship." Plaintiff claims that an ether must contain the same carbon-oxygen backbone.

<sup>6</sup> Because the court finds that DCEE is an ether of monohydric alcohol, it does not have to reach the question of whether it is also a halogenated derivative of diethyl ether.

<sup>7</sup> The following excerpts of Plaintiff's initial brief address the issue directly:

1) Thus, the lack of a monohydric or polyhydric alcohol in DCEE precludes DCEE from being an ether of a monohydric or polyhydric alcohol or a derivative thereof (*Wills Aff.* ¶ 10). *Pl.'s Br.* at 8.

2) As there is no monohydric or polyhydric alcohol in this chemical structure of DCEE, it is not an ether of a monohydric or polyhydric alcohol, nor a derivative thereof. *Wills Aff.* at ¶ 10.

The government, in response, offers plausible and supported reasoning for the proposition that DCEE is an ether of monohydric alcohol. Customs first looks to the Explanatory Notes to sub-chapter IV, under 29.09 which state:

Ethers may be considered as alcohols or phenols in which the hydrogen atom of the hydroxyl group is replaced by a hydrocarbon radical (alkyl or aryl). They have the general formula: (R-O-R<sup>1</sup>), where R and R<sup>1</sup> may be the same or different.

As stated, this definition contains two ambiguities. First, it does not direct a classification, but states that ethers “may be considered as alcohols” in which the hydrogen atom is replaced by a hydrocarbon radical. The second ambiguity is the use of the word “replaced.” It may be used to describe the chemical relationship between ethers and alcohols. It also may give support to Plaintiff’s contention that unless the ether is produced by “replacing” the hydrogen atom with a hydrocarbon radical it is not considered an ether of that alcohol. It is undisputed that the DCEE in question is not produced by the process of replacing a hydrogen atom with a hydrocarbon radical. Plaintiff, therefore, argues that, since DCEE is not the result of a process of replacing the hydrogen atom, then it is not an ether of monohydric alcohol. *See Pl.’s Sur-Reply to Def.’s Resp. to Pl.’s Opp. to Def.’s Cross-Mot. for Summ. J. (“Pl.’s Sur-Reply”)* at 3. Defendant’s argument, by contrast, assumes that the word “replaced” should be seen as descriptive of the difference between the two compounds, and that it merely notes the chemical structure relationship—not the manufacturing relationship. *See Def.’s Reply* at 7. Defendant’s argument is bolstered by the fact that the Explanatory Notes states that ethers can be described as having a “general formula.” The word “formula” indicates to the court that it is the structure of the compound, not its production process, that is critical to determining its classification.

Defendant also supports its case by noting that DCEE is listed in the Explanatory Notes as a symmetrical acyclic ether along with diethyl ether, di-isopropyl ether, dibutyl ether and dipentyl ether. Defendant contends that this listing supports its conclusion that the key to defining ethers of monohydric alcohols is that they contain the same “carbon relationship with water and alcohols.” *Def.’s Reply Br.* at 9. Plaintiff, however, disputes that a carbon structure analysis is useful. Instead, it contends the proper structural analysis is one that looks at the carbon-oxygen backbone, and that DCEE does not share a carbon-oxygen backbone with 2-chloroethanol, and, therefore, should not be considered structurally related. *See Pl.’s Reply to Def.’s Cross-Mot. for Summ. J.*

and *Opp. to Pl's Cross-Mot. for Summ. J.* (“*Pl.'s Reply Br*”) at 7.<sup>8</sup> Defendant counters that a carbon-oxygen backbone analysis would not work, because di-isopropyl ether, dibutyl ether and dipentyl ether are listed in the Explanatory Notes as symmetrical acyclic ethers but they “do not contain any monohydric or polyhydric alcohols in their structures” and “do not possess the same carbon/oxygen backbone of their related alcohols. However, they do have the same carbon structure of those alcohols.” *Def.'s Reply Br.* at 9 (emphasis in original).

Defendant also contends that the listing of DCEE in the Explanatory Notes along with other ethers supports its position that DCEE should be seen primarily as an ether and not as a derivative.<sup>9</sup> *Def.'s Resp. to the Court's Questions* at 5. However, this is unpersuasive since both parties agree that DCEE can be considered an acyclic ether and a halogenated derivative of diethyl ether, under different circumstances. The listing in the Explanatory Notes does not solve the question of whether it is an ether of monohydric alcohol. It merely restates what is already known.

Looking beyond the HTSUS and its supporting documents, the government points to other scientific references to support its determination. *Id.* The definition for ethers in *The Condensed Chemical Dictionary*, (Van Nostrand Reinhold Co., 7th ed. 1966) (“*Chemical Dictionary*”), states:

Chemically, ethers are compounds of neutral character derived from alcohols by elimination of water (one molecule of water from two molecules of alcohol). A better general characterization is that an ether is an organic compound in which an oxygen atom is interposed between two carbon atoms in the molecular structure.

*Chemical Dictionary* at 381.

This definition provides foundation for Defendant’s position. It indicates that for chemistry purposes it is the relationship between the alcohol and the ether by method of dehydration that is the common method for defining an ether. In addition, by using a secondary definition that focuses on the structure of the compound, and not its method of production, the *Chemical Dictionary* supports Defendant’s argument that the court need not consider how the DCEE at issue here was actually produced in order to decide the correct classification.

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<sup>8</sup>In its initial brief Horn argued that DCEE is not an ether of monohydric alcohol because it does not contain monohydric alcohol in its structure; and it is a halogenated derivative of diethyl ether. Therefore, in accordance with sub-heading Note 1 it should be classified with diethyl ether. *Pl.'s Statement of Material Facts* ¶ 13. In its reply brief it counters Defendant’s argument that DCEE is an ether of a monohydric alcohol (2-chloroethanol), by arguing, “DCEE cannot scientifically be considered a derivative of 2-chloroethanol under either of the relevant definitions. As a consequence, DCEE is not classifiable under Subheading 2909.19.10, HTSUS as a monohydric alcohol.” *Pl.'s Reply Br.* at 7 (The two definitions are “produced from” or “structurally related.”). Implicit in this statement is that “derivative” is a broader category than “ether of.” Therefore, if DCEE is not a derivative of 2-chloroethanol then it cannot be an ether of 2-chloroethanol. At oral argument Plaintiff was more explicit, stating that: “And, I would state there that the definition of how an ether is produced is more narrow, [than a derivative] and that it would actually have to be made from. And in this case we do not have an ether made from a monohydric alcohol.” *Oral Arg. Tr.* at 14: 8–12.

<sup>9</sup>The Notes provides a list of symmetrical acyclic ethers:

- (1) Diethyl ether. \* \* \*
- (2) Di(chloroethyl) ether, or dichlorodiethyl ether.
- (3) Di-isopropyl ether.
- (4) Dibutyl ether.
- (5) Dipentyl ether (diamyl ether).

Plaintiff discounts the first part of this definition because the definition predates Plaintiff's manufacturing methodology which does not rely on dehydration. Therefore, Horn contends, it does not apply in this case. Plaintiff addresses the second part of this definition by focusing on what the term "structurally related" means.<sup>10</sup>

Plaintiff relies on Dr. Wills for the proposition that other ethers of monohydric alcohol are actually produced from those monohydric alcohols and that "[d]ehydration is the only practical commercial method for the manufacture of these ethers." *Pl.'s Sur-Reply* at 3 (citing *Wills Aff. to Pl.'s Sur-Reply* ¶ 5).

Further, Dr. Wills contends that, as a general rule, ethers do not share the same carbon-oxygen backbone with the monohydric alcohol they are produced from, which means, according to his interpretation of the term, they are not "structurally related." *Wills Aff. attached to Pl.'s Sur-Reply* ¶ 6. Plaintiff also contends that, even if the court were to use a carbon-only backbone definition for structurally related, DCEE is not structurally related to 2-chloroethanol. DCEE and diethyl ether both contain two 2-carbon segments. DCEE and diethyl ether's backbone is C-C-Oxygen-C-C. 2-chloroethanol's backbone, according to Dr. Wills, is C-C-oxygen. Plaintiff, however, does not provide any support for use of the carbon-oxygen backbone, or for interpreting the carbon backbone to mean 2-carbon segments.<sup>11</sup>

To lend further support to its position, Defendant cites *Ullman's Industrial Organic Chemicals* ("*Ullman's*"), which supports the idea that the link between an ether and an alcohol is one of dehydration. Vol. 4 (Wiley-VCH 1999). While ethers may be produced from various compounds, *Ullman's* states: "[e]thers are generally prepared by catalytic dehydration of alcohols or by reaction of alkyl halides with alkoxides." *Id.* at 2188.

Despite the complexity of determining the proper meaning of the phrase "ether of monohydric alcohol," the words of the HTSUS and reference to other persuasive sources provide an answer. The HTSUS divides ethers between those of monohydric and polyhydric alcohols. Although ethers can be produced by multiple methods, the tariff schedule divides them according to their relationship to a corresponding monohydric alcohol. Chapter 29 Subheading Note 1 provides an alternative for classification if a compound does not have a direct relationship with an alcohol.

The *Chemical Dictionary*, *Ullman's* and the Explanatory Notes all indicate that in common usage and under the tariff schedule, it is the relationship of an ether and a corresponding alcohol that is the important

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<sup>10</sup> This portion of Plaintiff's argument relies on an assumption that an ether must be a derivative of the monohydric alcohol if it is an "ether of." Plaintiff does not make this argument explicitly. However, in its briefs it claims that DCEE is not a derivative of 2-chloroethanol. *Pl.'s Sur-Reply* at 2-3. This statement makes sense only if it means: DCEE is not an ether of 2-chloroethanol because it is not a derivative of 2-chloroethanol. See note 6 *supra*.

<sup>11</sup> Defendant also provides an affidavit of an expert, Dr. James Canary, Associate Professor and Associate Chair of the Department of Chemistry, New York University. Dr. Canary disputes that the carbon-oxygen backbone should be used to define structurally-related, because "[t]here are many other examples in the HTSUS in which compounds classified as derivatives do not contain the same carbon-oxygen backbone." *Canary Decl. attached to Def.'s Reply Br.* at ¶ C.

relationship for distinguishing various compounds under the heading at issue. Furthermore, it is “dehydration” which defines that relationship. In some cases, an ether will actually be made from an alcohol, but there are several different methods of producing the same chemical compound. As Defendant points out, the tariff schedule should not be interpreted by reference to the method of producing the chemical compound at issue, instead of the relative simplicity of the finished product’s chemical structure. Relying on method of production would undermine any consistency in the classification of imported chemicals, as new and complex chemical processes are developed constantly.

Further, the court rejects Plaintiff’s contention that “structurally related to” means that an ether must contain the alcohol it is related to. This is an overly narrow interpretation of the phrase “related to.”<sup>12</sup> Plaintiff essentially limits “structurally related to” to mean sharing the same chemical structure. As Defendant points out, if “structurally related to” requires that any ether contain the monohydric alcohol it is related to, then no ether would be related to a monohydric alcohol. This is because the generally accepted meaning of ether is that of an alcohol which has been dehydrated, so by definition an ether is an alcohol with some element removed. If it is necessary that “acyclic ethers of monohydric alcohols must contain the monohydric alcohol in their structure, the provision for acyclic ethers of monohydric alcohols, and the ethers of polyhydric alcohols would be eviscerated.” *Def.’s Br.* at 13–14.

The court finds that where an ether can be described by a chemical formulation which represents dehydration of a monohydric alcohol resulting in an ether, whether actually produced by that process or not, it should be considered an ether of monohydric alcohol for classification purposes.<sup>13</sup>

Relying on a definition of “ether” that looks to the chemical structure of the compound, and not its method of production is consistent with traditional rules of tariff schedule interpretation. “It is a well-established principle that classification of an imported article must rest upon its condition as imported.” *Carrington Co. v. United States*, 497 F.2d 902, 905 (CCPA 1974) (citing *United States v. Baker Perkins, Inc.*, 46 CCPA 128 (1959)). To define “ether” based upon its production process would lead to chemical compounds with exactly the same chemical structure—expressed in exactly the same chemical formula—being classified as different items. HTSUS 2909.19.1090 is an *eo nomine* provision “in that [it describes] goods by ‘specific names’ and ones ‘known to commerce.’” *Chevron Chem.*, 59 F. Supp. 2d at 1367 (quoting *United States v. Bruckmann*, 582 F.2d 622, 625 (CCPA 1978)). Unless there is evidence of contrary legislative intent, an *eo nomine* provision naming “an article without terms of limitation \* \* \* is deemed to include all

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<sup>12</sup> *Webster’s Ninth New Collegiate Dictionary* (1988) defines “relate” as “to show or establish logical or causal connection between.” This definition also indicates that to be “related to” does not require that a derivative contain the same structure, merely that there be a “logical or causal connection between” the two structures.

<sup>13</sup> Using this definition of “ether of monohydric alcohol” means that the court does not directly address the question of what is the appropriate “backbone” analysis, except to the extent that dehydration touches on that analysis.

forms of the article. *Id.* (citing *Nootka Packing Co. v. United States*, 22 CCPA 464, 469–70 (1935)). Ensuring uniformity and fair application of the customs laws is a “primary purpose or function of this Court.” *Amorient Petroleum Co. v. United States*, 9 CIT 197, 203, 607 F. Supp. 1484, 1489 (1985) (citing H.R. Rep. No. 1235, 18–19, *reprinted in* 1980 U.S.C.C.A.N. 3729–30).

In this case DCEE’s chemical composition is identical to that which would occur as the result of dehydration of a monohydric alcohol (2-chloroethanol). DCEE is, therefore, an ether of monohydric alcohol, even though the product imported by Plaintiff is not actually manufactured by the process of dehydration from a monohydric alcohol. DCEE, therefore, is specifically provided for under the HTSUS subheading 2909.19.1090 as an ether of monohydric alcohol other than MTBE. Because it is specifically provided for under that subheading, it does not need to be classified as a derivative of diethyl ether according to the terms of Subheading Note 1 to Chapter 29.

#### V. CONCLUSION.

Customs’ classification of DCEE under 2909.19.1090 is sustained. Plaintiff’s Motion for Summary Judgment is denied. Defendant’s Cross-Motion for Summary Judgment is granted. Judgment will be entered accordingly.

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(Slip Op. 03–21)

FORMER EMPLOYEES OF PITTSBURGH LOGISTICS SYSTEMS, INC.,  
PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 02–00387

[Secretary of Labor’s negative eligibility determination for trade adjustment assistance remanded.]

(Dated February 28, 2003)

*King & Spalding*, Washington, D.C. (*Lisa L. Cochrane, J. Michael Taylor, Stephen A. Jones*), for the plaintiff.

*Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Director, *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Paul D. Kovac*); *Louisa M. Reynolds*, Office of the Solicitor, U.S. Department of Labor, for the defendant.

#### OPINION

MUSGRAVE, *Judge*: The plaintiffs challenge the denial of their petition for trade adjustment assistance (“TAA”) benefits. Section 222 of the

Trade Act of 1974 (the “Act”), as amended and codified at the time<sup>1</sup> at 19 U.S.C. § 2272(a), required the Secretary of the U.S. Department of Labor, Office of Employment and Training Administration (“Secretary,” “Labor,” and “ETA,” respectively) to certify group eligibility for TAA benefits if an investigation disclosed:

- (1) that a significant number or proportion of the workers in such workers’ firm or an appropriate subdivision of the firm have become totally or partially separated,
- (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
- (3) that increases of imports of articles like or directly competitive with articles produced by such workers’ firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a). If any of these conditions was found not to exist, the ETA would deny TAA certification. *See, e.g., International Union, UAW Local 1283 v. Reich*, 22 CIT 712, 713, 20 F.Supp.2d 1288, 1290 (1998).

On February 16, 2001, the ETA found that “increases of imports of articles like or directly competitive with steel produced by LTV Steel Company, Inc., Cleveland, Ohio, contributed importantly to the decline in sales or production and to the total or partial separation of workers of that firm” and certified workers at LTV’s Cleveland plant for TAA benefits. TA–W–38,362 (Feb. 16, 2001).<sup>2</sup> *See* 66 Fed. Reg. 18117 (Apr. 5, 2001). The plaintiffs’ job separation occurred at the end of December 2001, when LTV Steel Company, Inc. ceased production and totally or partially separated its employees. The plaintiffs were employed by Pittsburgh Logistics Systems, Inc. (“PLS”) and worked on-site at LTV’s facilities in Independence, Ohio. On February 18, 2002, the plaintiffs applied for TAA certification, claiming that they had been terminated as a consequence of LTV’s discontinuance of production. PR Doc 1 at R 1. The administrative record shows that the petition was deemed “instituted” on March 25, 2002 and was denied four days later. *Cf. id. with* PR Doc 7 at R 17 (TA–W–41,185) (Mar. 29, 2002). Notice of the ETA’s denial was published in the Federal Register at 67 Fed. Reg. 18923 (Apr. 17, 2002). *See* PR Doc 8 at R 20. The ETA reasoned that “the affected workers were engaged in employment related to the management of warehousing and distribution services for steel manufacturing firms” and that “the workers of the subject firm did not produce an article within the meaning of section 222 of the Trade Act of 1974.” PR Doc 7 at R 17–18. The ETA also denied the plaintiffs’ petition for TAA certification as “service workers,” stating that it “has consistently determined that the performance of services does not constitute production of an article, as required by the

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<sup>1</sup> The plaintiffs’ petition preceded the 90th day following the effective date of the Trade Adjustment Assistance Reform Act of 2002. *See* Pub. L. No. 107–210 § 151, 116 Stat. 933, 953–54 (Aug. 6, 2002).

<sup>2</sup> TAA decisions referenced herein may be viewed for the time being on the internet at URL [http://wdsc.doleta.gov/trade\\_act/taa/otaa/taadecisions/xxxxx.txt](http://wdsc.doleta.gov/trade_act/taa/otaa/taadecisions/xxxxx.txt) and substituting the relevant TA-W number for “xxxxx”.

Trade Act of 1974 \* \* \*.” *Id.* By way of further explanation, the ETA reiterated its “traditional” interpretation that

[w]orkers of the subject facility may be certified only if their separation was caused by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control. Additionally, the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification and the reduction must directly relate to the product impacted by imports.

*Id.*

The plaintiffs timely applied for reconsideration pursuant to 29 C.F.R. § 90.18, *see* PR Doc 9 at R 24, 25, which was denied on May 30, 2002 on the ground that the closure of LTV was

not relevant since the workers do not produce an article within the meaning of Section 222(3) of the Act. The subject workers may be certified only if their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control.

PR Doc 10 at R 27, 28. *See* 67 Fed. Reg. 40341 (June 12, 2002).

Thereafter, this action was initiated by Mr. Robert Weintzertl on behalf of the plaintiffs via a letter which was received by the Clerk of the Court on May 29, 2002 and deemed a challenge to those denials. King & Spalding accepted representation for the plaintiffs *pro bono* on or about June 24, 2002, and on September 5, 2002 filed an amended complaint, the thrust of which is that the ETA’s investigation was inadequate and the determination is unsupported by substantial evidence on the record.

Now before the Court are the plaintiffs’ motions to supplement the administrative record with certain declarations or in the alternative remand for further investigation, for judgment on the agency record under USCIT Rule 56.1, and for expedited oral argument. The government opposes the first two motions and, as ascertained by the Clerk of the Court, does not intend to respond to the third. The parties agree that the issue here concerns the third prong of 19 U.S.C. § 2272(a). The plaintiffs argue that they were a “PLS subdivision” consisting of former LTV workers and assert that they were under the *de facto* control of LTV and performing duties that were essential to the production of steel at LTV’s facilities. Pl.s’ Br. in Supp. of Mot. for Judgm. on Agency Record (“Pl.s’ Br.”) at 5, 20–21. Since LTV employees at LTV’s Cleveland production facility and certain employees at the Independence facility were granted TAA eligibility, the plaintiffs argue that separated workers under LTV’s control should also have been certified for TAA benefits.<sup>3</sup>

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<sup>3</sup> Pl.s’ Br. at 10, referencing TA–W–34,779, *Philadelphia, Bethlehem & New England Railroad, Bethlehem, PA; Notice of Revised Determination on Reopening*, 63 Fed. Reg. 54499 (Oct. 9, 1998) (Secretary of Labor determination that employees of a subsidiary firm providing transportation services on behalf of a steel company’s production facility were eligible for TAA benefits since TAA benefits had already been granted to workers at the production facility).



The plaintiffs assert that they first raised the above issues in their original petition and again in their request for reconsideration,<sup>4</sup> and they attach to their motion to supplement the declarations of Mr. Weintzetzl and Mr. Robert Dunn, Chief Financial Officer for PLS and former representative on the LTV account to support their position. The government opposes introduction of matter outside the administrative record and argues that substantial evidence supports the ETA's determination. In view of the commendable quality of the briefs, the Court considers oral argument unnecessary, and for the following reasons grants the plaintiffs' motion to supplement and remands the matter to the ETA for further proceedings not inconsistent with this Opinion.

#### DISCUSSION

Jurisdiction is invoked pursuant to 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1). Judicial review of denial of TAA eligibility is pursuant to 19 U.S.C. § 2395(b), which provides in pertinent part:

The findings of fact by the Secretary of Labor \* \* \*, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

See also 28 U.S.C. § 2640(c).

"Substantial evidence is \* \* \* such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938). A court must consider the totality of the evidence on the administrative record as a whole including that which fairly detracts from the agency's decision, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464 (1951), but since substantial evidence "is something less than the weight of the evidence, \* \* \* the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Conso-lo v. Federal Maritime Commission*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, (1966).

#### I.

On the adequacy of the investigation, the government states at the outset that on-site investigations and personal interviews of every petitioner from all cases around the country is impracticable, and therefore investigators must rely upon the information provided by petitioners

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<sup>4</sup> Pls' Br. at 7. See PR Doc 2 at R 2-4 ("All the above Pittsburgh Logistics employees were integral to the operations of LTV Steel, and worked in the General Office of that Company"); PR Doc 9 at R 25 ("Our jobs were eliminated due to lack of work caused by LTV Steel CO. [sic] Inc. shutdown due to imports. Our company still exists, at other locations but there are no jobs available in this area, due to the shutdown of the only employer that the company dealt with in Cleveland Ohio.").

and their companies in making a certification recommendation. Def's Mem. in Opp. to Pl.s' Mot. for Judgm. Upon the Agency Record ("Def.'s Br.") at 5. The government justifies the ETA's decision in this instance in part based upon the "minimal information provided by plaintiffs in their petition materials" and upon the strict time constraints within which ETA must complete its numerous investigations. *Id.* at 6. By regulation, however, the ETA is obliged "to marshal all relevant facts to make a determination on the petition[.]" 29 C.F.R. § 90.12. "To marshal" connotes ordering or mustering activity, certainly not passivity.

In general, the agency's choice of procedure to implement its assignment is a matter within its discretion,<sup>5</sup> but the ETA is obligated to conduct its investigation with the *utmost regard* for the interests of petitioning workers due to the *ex parte* nature of TAA proceedings and the remedial purposes of the statute. *See, e.g., Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 26 CIT \_\_\_\_, 215 F.Supp.2d 1345, 1350 (2002); *Stidham v. United States Dep't of Labor*, 11 CIT 548, 551, 669 F.Supp. 432, 435 (1987). An inadequate investigation is not entitled to deference. *See, e.g., Former Employees of Hawkins Oil and Gas, Inc. v. United States Sec'y of Labor*, 17 CIT 126, 130, 814 F.Supp. 1111, 1115 (1993). The question has been formulated as whether an investigation is so "marred" that an ETA finding is deemed arbitrary or of such a nature that it could not have been based on substantial evidence. *See, e.g., Former Employees of Barry Callebaut v. Herman*, 25 CIT \_\_\_\_, 177 F.Supp.2d 1304, 1308 (2001); *certified after remand*, Slip Op 02-103, 2002 WL 31528611 (Aug. 30, 2002); *Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 469, 715 F.Supp. 378, 381 (1989). The developed record must evince substantial evidence to confirm or refute relevant issues encountered during the course of the investigation, and if an investigation does not pass a threshold of reasonable inquiry, the record is unsupported by substantial evidence. *See, e.g., Former Employees of State Manufacturing Co. v. United States*, 17 CIT 1144, 1148, 835 F.Supp 642, 645 (1993); *Former Employees of General Electric Corp. v. United States Department of Labor*, 14 CIT 608 (1990).

The Court reviews the administrative record for substantial evidence to support the determinations reached on a denial of TAA eligibility. 19 U.S.C. § 2395(b). *See* 28 U.S.C. § 2640(c). *See also Abbott v. United States Sec'y of Labor*, 3 CIT 54, 54 (1982). If the plaintiffs demonstrate that the record is inadequate, that may constitute "good cause" for remand, but good cause is not an independent standard permitting consideration of evidence outside the administrative record to prove the record's inade-

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<sup>5</sup> *See, e.g., Former Employees of Champion Aviation Products v. Herman*, 23 CIT 349, 350 (1999); *Former Employees of Komatsu Dresser v. United States Sec'y of Labor*, 16 CIT 300, 303 (1992).

quacy. *De novo* evidence may serve to highlight the inadequacy, once that has been established.<sup>6</sup>

## II.

*Woodrum v. Donovan*, 5 CIT 191, 564 F.Supp. 826 (1993), stated that the “predicate” for certifying a petition “is a finding that petitioning workers were employed by a ‘firm’ which produced, or had an ‘appropriate subdivision’ which produced, the import-impacted article.” 5 CIT at 199, 564 F.Supp. at 833. On that authority, the government argues that under either a “production” or “service” worker analysis, substantial record evidence supports the ETA’s determination because the record does not support the plaintiffs’ contention that PLS is a “firm” engaged in steel production or an “appropriate subdivision” of a steel producer.<sup>7</sup> The government further maintains that once the ETA concluded that the plaintiffs’ firm was not “the” producer of the import-impacted article “the analysis ends, without further consideration of the nature of [the] plaintiff[s]’ work.” Def’s Br. at 15, referencing *Former Employees of Stanley Smith, Inc. v. United States Sec’y of Labor*, 20 CIT 201, 205, 967 F.Supp. 512, 516 (1996). Furthermore, the government argues, even if the “service” worker analysis was relevant the ETA’s determination is correct because there is no evidence indicating “corporate control” or a “corporate connection” between PLS and LTV by way of “shared board of directors, shared assets, or any other indicia of a corporate relationship” and that simple control by LTV over employees’ day to day activities is insufficient.

Central to the plaintiffs’ claims is the relationship of their (respective) subdivision(s) to production at LTV, not the relationship of LTV to PLS (as a whole). The government’s arguments rather attempt to place the production line for an import-impacted article within a single business entity, for example by referencing *Abbott v. Donovan*, 6 CIT 92, 99, 570 F.Supp. 41, 48 (1983) for the “well settled” principle that the determina-

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<sup>6</sup> *But, cf. Ammex v. United States*, 23 CIT 549, 62 F.Supp.2d 1148 (1999) (discussing CIT Rule 72(a)). The Court is nonetheless mindful of the fact that this matter involves investigation of a *pro se* petition. Judicial review of both TAA and social security benefits cases is based upon substantial evidence on the record and both specify remand for “good cause,” *cf.* 19 U.S.C. § 2395(b) with 42 U.S.C. § 405(g), and the duty of the ETA investigator towards a *pro se* TAA petition may be likened to the duty of an administrative law judge towards a *pro se* social security benefits claim. An administrative law judge examining a *pro se* social security benefits claim has a duty to “scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.” *Hennig v. Gardner* 276 F.Supp. 622, 624–25 (D.C. Tex 1967). This and similar refrains have been repeated in appellate level social security benefits cases. *See, e.g., Brock v. Chater*, 84 F.3d 726, 128 (5th Cir. 1996); *Mitchell v. Shalala*, 25 F.3d 712, 714 (8th Cir. 1994); *Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir. 1992); *McGill v. Sec’y of Health & Human Servs.*, 712 F.2d 28, 31–32 (2d Cir. 1983); *Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir. 1981).

<sup>7</sup> The government also notes that downsizing had begun at PLS’s headquarters in Rochester PA in September 2001, and it references the plaintiffs’ request for reconsideration, in which they note that PLS “still exists, at other locations \* \* \* [,]” despite LTV’s bankruptcy and the plaintiffs’ separation. *Id.* at 3–4, referencing CR Doc. 6 at R 16; PR Doc 9 at R 25. The rest of the request for reconsideration reads: “\* \* \* but there are no jobs available in this area, due to the shutdown of the only employer that the company [PLS] dealt with in Cleveland, Ohio.” PR Doc 9 at R 25.

tion of “appropriate subdivision”<sup>8</sup> is made along product lines. It is true that “appropriate subdivision” equates to, and is therefore delineated by, the production line of the of the import-impacted article, but nowhere in the language of the statute is it implied that “appropriate subdivision” must be confined or defined in terms of a single business entity producing the import-impacted article. The second prong of the statute mentions only “sales or production” of the firm or appropriate subdivision, and the third prong only refers to “articles produced” by the workers’ firm or appropriate subdivision. 19 U.S.C. §§ 2272(a)(2)&(3). A product line, or appropriate subdivision where the articles are produced, can encompass more than a single “establishment.”<sup>9</sup> See *Lloyd v. U.S. Dep’t of Labor*, 637 F.2d 1267 (9th Cir. 1980); *International Union, UAW v. Marshall*, 584 F.2d 390, 394 n.15, 397 (D.C. Cir. 1978). Those cases also indicate that “appropriate subdivision” requires a non-mechanical, flexible interpretation, and that is equally true of “firm,” which by definition can encompass “partnership, joint venture, association, \* \* \* cooperative,” *et cetera*. 29 C.F.R. § 90.2. See *id.* Both must be interpreted as necessary to encompass the distinct “parts” that relate to the “production” of the import-impacted article. Depending on circumstances, those parts may be separate business entities engaged in their respective roles in the common enterprise that produces the import-impacted article. This must be so, or the so-called “service” worker analysis, which attempts to effectuate section 222 of the Trade Act of 1974, and which essentially accomplishes the same result as the foregoing, see PR Doc 17 at R 17–18, would amount to an unlawful, *ultra vires* interpretation of the statutory language from which its authority derives.<sup>10</sup> And notwithstanding the government’s reference to *Stanley Smith*, 20 CIT at 205, 967 F.Supp. at 515, the Court has acknowledged that the ETA does investigate whether petitioners may be eligible for certification as “service” workers if it determines that they did not participate in the production of an import-impacted article. See, e.g., *Marathon Ashland Pipeline*, *supra*, 26 CIT at \_\_\_\_\_, 215 F.Supp.2d at 1353; *Bennett v. U.S. Sec’y of Labor*, 20 CIT 788, 792 (1996); *Abbott v. Donovan*, *supra*, 6 CIT at 101, 570 F.Supp. at 49.

TAA was intended to benefit those who had been engaged in the production of an import-impacted article, and courts have noted the common meaning of “production,” *i.e.*, to “give birth, create or bring into

<sup>8</sup> By regulation:

“Appropriate subdivision” means an establishment in a multi-establishment firm which produces the domestic articles in question or a distinct part or section of an establishment (whether or not the firm has more than one establishment) where the articles are produced. The term “appropriate subdivision” includes auxiliary facilities operated in conjunction with (whether or not physically separate from) production facilities.

\* \* \* \* \*

“Firm” includes an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustee in bankruptcy, and receiver under decree of any court. A firm, together with any predecessor or successor-in-interest, or together with any affiliated firm controlled or substantially beneficially owned by substantially the same persons, may be considered a single firm.

29 C.F.R. § 90.2.

<sup>9</sup> “Establishment” (like the word “firm”) connotes permanence. See *International Union, UAW v. Marshall*, 584 F.2d 390, 397 n.30 (D.C. Cir. 1978) (citation omitted).

<sup>10</sup> This would apparently implicate Labor’s interpretation of section 222 and the necessity for having a “service worker” analysis in the first place.

existence.” *See, e.g., Woodrum, supra*, 5 CIT at 198, 564 F.Supp at 831. In the abstract, the farmer, granger, miller, baker, driver, and grocer may *all* be said to relate to the production of bread to the ultimate consumer, but it is at least clear that “mere” repair and maintenance on an existing article, or work that does not involve transformation of a thing into something “new and different,” will not suffice for TAA eligibility. *See, e.g., Nagy v. Donovan*, 6 CIT 141, 145, 571 F.Supp. 1261, 1264 (1983). *See also Pemberton v. Marshall*, 639 F.2d 798 (D.C. Cir. 1981). As for the remainder, the ETA must gerrymander “firm” and “appropriate subdivision” according to the product line that workers were involved in producing, whether under a “production” or “service” worker analysis, but it must do so consistently in considering each petition as it relates to the import-impacted article and provide a reasoned analysis and substantial evidence to support any determination. *See Marathon Ashland Pipeline, supra*, 26 CIT at \_\_\_\_, 215 F.Supp.2d at 1353. It has not done so here. Petitioners are required to provide *inter alia* “[a] description of the articles produced by the workers’ firm or appropriate subdivision, the production or sales of which are adversely affected by increased imports, and a description of the imported articles concerned.” 29 C.F.R. § 90.11(c)(7). Here, the import-impacted article is steel, and the plaintiffs petitioned that the article could not have been produced without their work. Proper delineation of the import-affected production line (*i.e.*, “firm” and “appropriate subdivision”) may or may not encompass the “PLS subdivision at LTV Steel.” That depends on whether the tasks performed by the petitioners can be said to have been integrated into or, alternatively, integral to the production line. *Cf.* CR. Doc. 6 at R 16. (investigator’s conclusion that the petitioners were not “involved in the production *process*”) (*italics added*). The record does not evince substantial evidence to support the conclusion reached.

### III.

The ETA’s denial of eligibility on the “production” worker question relied on the finding that PLS “managed warehousing and distribution” and its denial of eligibility on the “service” worker question simply set out its usual interpretation of service worker eligibility.<sup>11</sup> Neither can be construed as a sufficient investigation into and analysis of how the plaintiffs’ firm or subdivision did not relate to production of the product line at issue. The work of “manag[ing] warehousing & distribution” and “managing traffic and processing of freight invoices” does not *per se* resolve to work unrelated to production, and the determination provides no description of what the plaintiffs’ actual job duties were. Similarly, it is not “performance of services” *per se* that may be considered ineligible

<sup>11</sup> If petitioning former workers are not directly eligible for TAA benefits as “production” workers, consistent with its remedial statutory mandate the ETA may nonetheless certify eligibility for TAA benefits if

- (1) their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control;
- (2) the reduction in the demand for their services originated at a production facility whose workers independently met the statutory criteria for certification; and
- (3) the reduction directly related to the product impacted by imports.

*See, e.g., Former Employees of Chevron Prods. Co. v. U.S. Sec’y of Labor*, Slip Op. 02–131 (Oct. 28, 2002) at 23–24.

for TAA benefits, it is the “performance” of “services” *unrelated* to the production of a tangible article that may be considered ineligible for TAA benefits. *See, e.g., Pemberton v. Marshall, supra.*<sup>12</sup> Production cannot occur without the “performance of services” by “workers” however labeled or tasked. If the ETA was attempting to distinguish the “output” of a worker or firm (*i.e.*, between production of a tangible thing and an intangible thing), it did so obliquely.

The ETA’s determination must be addressed as it stands. While a reviewing court may “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned[.]” *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286, 95 S.Ct. 438, 442 (1974), it “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1947). To the extent the government advocates sustaining the ETA’s service worker determination on the basis of an interpretation that implies corporate control, the argument amounts to *post hoc* reasoning. An agency’s permissible interpretation of its own regulations may deserve substantial deference, *e.g., Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159, 108 S.Ct. 427, 440 (1987); *Former Employees of Bass Enterprises Production Co. v. United States*, 12 CIT 470, 473, 688 F.Supp. 625, 628 (1988), but in this instance the ETA only made the unsubstantiated conclusion that the duties of the petitioners involved “services” and stated that it “has consistently determined that the performance of services does not constitute production of an article[.]” If the ETA reached the issue of “control” on the service worker question, it did so only by virtue of repeating the broad standards it applies to petitioners seeking such certification. *See* PR Doc 7 at R 18. That did not amount to an interpretation or application of “control” to the facts at hand.

On a denial of eligibility under either a “production” or “service” worker analysis, the ETA must explain to petitioners how their work was unrelated to production, and not merely state that it was. It must provide a reasoned analysis in order to comply with section 2272 of the Trade Act of 1974. *See Marathon Ashland Pipeline, supra*, 215 F.Supp.2d at 1353. Where the conclusion upon which a determination is based is not merely a restatement of the obvious, courts have observed that reliance upon unverified statements of company officials may be permissible if it may be concluded that such persons were “in a position to know,” *see, e.g., International Union, UAW Local 1283 v. Reich, supra*, 22 CIT at 723 n.15, 20 F.Supp.2d at 1297 n.15; *United Steel Workers of America, Local 1082 v. McLaughlin*, 15 CIT 121, 122 (1991), however an unverified statement will not amount to substantial evidence if it is contradicted by logic or other pertinent information in the record. *See, e.g., Former Employees of Shaw Pipe, Inc. v. United States Sec’y of Labor,*

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<sup>12</sup> *Pemberton* rejected the contention that the “appropriate subdivision” should be defined as encompassing both a shipbuilding yard and the appellants “repair and maintenance” shipyard. The court stated that “[t]he only relevant concern in determining whether a facility is part of the appropriate subdivision is whether it also produces the articles in question.” 639 F.2d at 801.

20 CIT 1282, 1289, 988 F.Supp. 588, 592 (1997) (agency's statement that "pipe used for pipeline transmission could be used without the protective coating, but is not likely" found inherently contradictory and did not support finding that petitioners did not "create or manufacture a tangible commodity, or transform it into a new and different article").

The Court does not presume that the Employment Development Specialist ("EDS") located in Rochester who responded to the investigator's questions about the petitioners was "in a position to know" the extent of the petitioners' jobs in Independence. The ETA's findings were apparently based upon: (1) the investigator's note on the verification guide that PLS workers "managed warehousing & distribution," PR Doc 4 at R 11, and (2) the EDS's written statement that the plaintiffs were involved in "managing traffic and processing of freight invoices," CR Doc 5 at R 13. Yet, the EDS also stated in the same document to the ETA: "our employees were engaged in employment related to the production of a product" which "was steel, specifically carbon flat-rolled steel." *Id.* The record does not contain any notes or other memorabilia of investigatory effort to substantiate those statements, and it does not appear that the ETA followed up with the "contact" persons the plaintiffs had listed on the petition or with company officials after the data request was sent out, nor did the ETA issue any subpoenas.<sup>13</sup> In fact, it appears the petitioners were not contacted for further input at all, except by notice to them of their right to a public hearing and invitation to submit written comment. That may satisfy compliance with procedural due process, *cf. Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948 (1978), and it may well be that in a straight-forward case an investigator is justified in determining that further contact with petitioners is unnecessary to establishing all the relevant facts, in light of the circumstances of the particular petition, but that does not relieve the administrator of having the "utmost regard" towards petitioners, especially those unrepresented by counsel, when undertaking fact-finding.

The form petition requested the "complete name and address of the firm and each subdivision of the firm at which the workers for whom this petition is filed are (were) employed." PR Doc 2 at R 3. The petitioners listed by hand "Pittsburgh Logistics Systems" in Independence, Ohio and in Rochester, Pennsylvania, without distinguishing either "firm" or "subdivision." *Id.* The petition was signed by three former employees of PLS who stated they "were employed at Cleveland Ohio." *Id.* In addition to the three signatories, the record includes an "Addendum to Original Petition" listing the names, addresses, and separation dates of seven other individuals who had been employed in Ohio, a total of ten petitioners for group eligibility and none were Rochester personnel. *Id.* at R 5. Section III of the petition requested the name, address, telephone num-

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<sup>13</sup> It is at least apparent, as the government implies, that the ETA's investigator discovered information that led to the questions posed to the EDS who responded on behalf of PLS. *Cf.* PR Doc. 4 at R 11 with CR Doc. 5 at R 13-14. However, the Court will not speculate on further effort to support the ETA's foregoing (or forgone) conclusion.

ber, and title of a “company official” who could be contacted for “additional information” (*i.e.*, “someone knowledgeable about the firm’s production, sales and employment”). The Addendum lists “Mr. Robert Dunn, Chief Financial Officer, The Quad Center, Rochester, PA” and his telephone number, as well as “Mr. Lee Duffenbaugher, Former General Mgr.” and one of the petition’s signatories, along with his address and telephone number in Ohio. The “company” those individuals were listed as connected to was Quadrivius, not PLS. *Id.* at R 4.

The ETA’s “Petition Screening and Verification Guide,” a public document, lists the “subject firm” and the “appropriate subdivision address” as “Pittsburgh Logistics Systems, The Quad Center, Rochester, PA.” *See* PR Doc 4 at R 11. It further lists “Quadrivius, Inc., The Quad Center, Rochester, PA” as the parent company of PLS. *Id.* The verification guide and the data inquiry indicate that on March 21, 2002 the ETA’s investigator determined to contact the aforementioned EDS at “Pittsburgh Logistics Systems, The Quad Center, Rochester, PA.” *See id.* (“Contact Official”); CR Doc 5 at R 13.

The EDS sent a response via facsimile transmission. The cover page is on the stationary of “Quadrivius Inc.,” stated at the bottom to be a “holding company comprised of Pittsburgh Logistic Systems, Inc.” and other companies. *Id.* at R 12. On the cover page the EDS provided name but not title or indication of connection to PLS. The data inquiry was addressed to the EDS at PLS in Rochester, PA, but the response provides no confirmation or corroboration that the EDS was employed by PLS as opposed to some other business entity at that address.

The first paragraph of the data inquiry describes that a petition had been filed for TAA on behalf of workers employed by PLS in Independence and Rochester. In response to the ETA’s request to list the “full legal name and address of the firm and subdivision at which the workers were employed,” the EDS listed the *firm* as Quadrivius, Inc. at its Rochester, Pennsylvania address and the *subdivision* as “Pittsburgh Logistics Systems Inc., c/o LTV Steel” in Independence, Ohio. *Id.* at R 13. Responding to the question of how many employees had been laid off from “*your* firm in Independence and Rochester,” the EDS responded “eleven.” *Id.* at R 14 (*italics added*). When asked to briefly explain the circumstances relating to layoffs that have taken place in the last year, the EDS responded “LTV had no purchase orders to fill, hence there was no work for *our* employees.” *Id.* (*italics added*) When asked whether “the workers in Rochester [were] in direct support of workers in Independence[,]” the EDS responded in kind: “the workers in Rochester were not in direct support of the workers in Independence.” *Id.*

The ETA’s “Findings of Investigation” state that: (1) that the subject of the investigation is “Pittsburgh Logistics Systems, on location at LTV Steel Corp in Independence, Ohio and Pittsburgh Logistics Systems in Rochester Pennsylvania”; (2) PLS is a “subsidiary” of Quadrivius; and (3) both Quadrivius and PLS are “based” in Rochester, Pennsylvania. The EDS’s response does not constitute substantial evidence in support



of the entirety of the foregoing, and it is unclear on the record how those determinations were arrived at. The EDS characterized “firm” and “subdivision” as Quadrius and “Pittsburgh Logistics Sys., Inc. c/o LTV Steel” respectively, and it is therefore unclear whether the EDS was referring to PLS employees only when she responded that “eleven” had been laid off from “your firm.” It is also, therefore, unclear whether the subdivision the EDS listed was “based” or had any presence in Rochester, Pennsylvania.

Some support for the view that PLS was “based” in Rochester may be found on the petition itself, which listed PLS as being in both Rochester and Independence, at least as the petitioners understood it, and it is at least apparent that the parent holding company, Quadrius, was located in Rochester at the time in question.<sup>14</sup> While the ETA is to be commended for including any PLS presence at Rochester in the scope of its investigation, the employment status of the eleventh “former employee”—by implication a person who had been at offices at The Quad Center in Rochester since the ten other former employees were specifically named on the petition and located in Ohio—is something of a mystery, since it is unclear, still, which entity the EDS was referring to when responding to “your firm” as opposed to Quadrius or PLS. If there is other information upon which the investigator relied to confirm whether PLS was “based” in Rochester, Pennsylvania at the time in question, that information should be apparent on the record. Furthermore, substantial evidence does not support the ETA’s assertion that “the affected workers were engaged in employment related to the management of warehousing and distribution services for steel manufacturing firms.” PR Doc 7 at R 17 (*italics added*). See CR Doc 6 at R 15. The only evidence of record indicates that they were engaged in work for LTV. The record must evince more to support any presumptions, to which the ETA might otherwise be entitled, on its findings of fact.

The Court acknowledges that the ETA’s resources may be stretched if inundated with TAA claims, and that it must comply with the pressure of short deadlines,<sup>15</sup> see 29 C.F.R. §§ 90.1–90.19; see also, e.g., PR Doc 3 at R 6–9 (listing almost 100 petitions from locations throughout the United States in the same 3–5 month period as plaintiffs’ petition); D. Billings, *DOL Statistics Show Significant Jump in Estimates of Job Losses Related to Trade*, 19 Int’l Trade Rep. (BNA) No. 8 at 309 (Feb. 21, 2002), but the Court cannot uphold a determination based upon manifest inaccuracy or incompleteness of record when relevant to a deter-

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<sup>14</sup> The Court further notes that Mr. Robert Dunn’s declaration states that he is the CFO for PLS (no address specified), but that is irrelevant to this part of the Opinion since that was not part of the administrative record and was listed as a Quadrius officer on the petition’s addendum.

<sup>15</sup> The plaintiff points out that the record of the investigation consists “only” of plaintiffs’ submissions and copies of published notices plus a petition log sheet (PR Doc 1 at R 1), a one-page Petition Screening and Verification Guide (PR Doc 4 at R 11), a two-page letter, plus fax cover sheet, completed by PLS’s spokesperson (CR Doc 5 at R 12–14), an investigative report consisting in substance of four paragraphs (CR Doc 6 at R 15–16), the Negative Determination (PR Doc 7 at R 17–19) (subsequently published), form letters to the petitioners informing them of the negative determination (PR Doc 11 at R 30–33), and the notice of negative determination regarding reconsideration (PR Doc 12 at R 34). It is, of course, quality and not quantity that is determinative, and the incompleteness on the pre-printed investigation sheet to which the plaintiffs draw attention is indicative of inadequacy as circumstances dictate. Here, the circumstances so dictate.

mination of fact. Viewing the record as a whole, the Court concludes that it is inadequate to support the determinations reached, and that it is necessary to remand the matter for additional proceedings. The plaintiffs' motion to supplement the administrative record is therefore granted, and upon remand the ETA shall incorporate the plaintiffs' declarations, which to this point have not been considered, into its analysis.

### III.

The plaintiffs claim that their work was integral to LTV steel production. The plaintiffs assert that they were responsible for overseeing the transport of coal, coke, lime, and limestone feedstock materials to LTV facilities via various modes of transport and that they were also responsible for the transportation of the product to customers, processors, and warehouses. Weintzetzl Decl. ¶ 4, 8; Dunn Decl. Ex. A. *See* Pl.s' Br. at 4. To support their argument that they constituted "production" workers eligible for benefits, attached to Exhibit 4 of their brief is a published article quoting the director of procurement for a steel producer describing transportation management and logistics as a "key business process" that "work[s] with our commercial and operations groups[.]" Pl.s' Br. at 21, referencing Ex. 4, S. Robertson, *Wheeling-Pitt Outsourcing Cuts Logistics Costs, American Metal Market*, Oct. 4, 2002, at 4.

According to the plaintiffs' amended complaint and declarations, Mr. Weintzetzl had been employed in LTV's Raw Materials Movement Group in 1984 when LTV established offices in Ohio and merged that group into its Steel Traffic Department. Weintzetzl Decl. ¶¶ 4. *See id.* ¶ 5. The newly-reconstituted Steel Traffic Department thereafter coordinated the movement of both raw materials used by LTV in the production of steel and finished steel, via various transport modes. *See* Am. Compl. ¶ 7; Weintzetzl Decl. ¶ 4, 6; Dunn Decl. ¶ 3. In 1995, LTV "outsourced" its Steel Traffic Department to PLS. The plaintiffs claim that all that changed from their perspective was the payor of their paycheck, that they otherwise "continued to perform essentially the same job duties, work in the same LTV facilities, and report to the same LTV management personnel[,] as before they were outsourced." Pl.s' Br. 4-5, referencing Am. Compl. ¶¶ 8-9; Weintzetzl Decl. ¶ 7.

The plaintiffs also claim that as a "PLS subdivision" they were "integrated into the LTV corporate structure" and reported "directly to LTV employees on all operational matters." Pl.s' Br. at 5, referencing Weintzetzl Decl. ¶¶ 7, 9; Dunn Decl. ¶¶ 4-8; and quoting Dunn Decl. ¶ 6. *See* Am. Compl. ¶ 11. The plaintiffs contend that LTV exercised the requisite level of "control" over their employment to satisfy the service worker test. For example, they assert, LTV managed all job tasks, directed which employees could work at specific locations and specifically relocated the PLS subdivision along with certain LTV facilities in Cleveland to LTV's facilities in Independence in July 2001, evaluated PLS employee job performance, and advised which PLS employees should receive merit salary increases. *Id.*, referencing Dunn Decl. ¶ 5 & PR Doc 4 at R 11.

The ETA's "service" worker analysis inquires, *inter alia*, whether workers were separated because their services were no longer needed by "a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control." The plaintiffs argue that LTV control over them satisfies the "firm related by control" prong. The plaintiffs argue that since TAA is determined by international trade, U.S. international trade law is appropriate for interpreting "control" in the context of the service worker analysis and 19 U.S.C. § 2272(a). *See* 19 U.S.C. § 1677(33) (in the antidumping and countervailing duty context, "control" is presumed "if [a] person is legally *or operationally* is in a position to exercise restraint or direction over the other person") (plaintiffs' highlighting). They argue that TAA is remedial so it is appropriate to interpret TAA "control" in the context of the common law principles of master-servant, as is done in Title VII cases.<sup>16</sup>

The government argues that the ETA interprets "control" as *corporate* control and not simply control over employees' day to day activities. It argues that decisions of this Court on the service worker analysis support this interpretation. Def's Br. at 16, referencing *Woodrum*, 5 CIT at 199, 564 F. Supp. at 833 ("On the basis of this definition, an independently owned and operated automobile dealership which is 'not controlled or substantially or beneficially owned' by a domestic car manufacturer is not part of the manufacturing firm \* \* \*"). The government contends the record of this matter shows no relationship between LTV and PLS other than a contractual one.

The plaintiffs respond that *Woodrum* rather supports their position because the case was remanded to ETA with instructions to conduct an investigation into both the *ownership* of the firm for which the plaintiffs worked as well as the *nature of the work* performed by the plaintiffs, which the ETA had failed to investigate. *Id.* at 15, referencing *Woodrum*, *supra*, 5 CIT at 199, 564 F.Supp. at 832-33 ("the Secretary has properly construed section 222(3) to exclude from its coverage workers for service firms not *managed, owned, or controlled* by a manufacturing firm producing the import-impacted [ ] article.") (plaintiffs' highlighting). To further support their view, the plaintiffs argue that their circumstances are analogous to two recent decisions granting TAA certification. In TA-W-39,535,<sup>17</sup> according to the plaintiffs, the ETA certified the former workers of three separate "subdivisions" of Computer Sciences Corporation working on-site at different locations of DuPont Corpora-

<sup>16</sup> Pl.'s Br. at 12, quoting *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979) (determining employment relationships under Title VII of the Civil Rights Act of 1964):

[T]he extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review here, as it is in the common law and in the context of several other federal statutes. If an employer has the right to control and direct the work of an individual, not only as to the result achieved but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

613 F.2d at 832-33.

<sup>17</sup> TA-W-39,535, A & B (Feb. 19, 2002) ("*Computer Sciences*") ("Upon examination of the data supplied by the applicant, it became apparent that the Computer Science Corporation contract workers were engaged in employment related to the production of polyester fiber at Dupont plants under an existing TAA certification."). *See Computer Sciences Corp., at Dupont Corp., Cooper River Plant, Charleston SC; Computer Sciences Corp., at Dupont Corp., Cape Fear Plant, Wilmington NC; Computer Sciences Corp., at Dupont Corp., Kinston Plant, Kinston NC.; Notice of Revised Determination on Reconsideration*, 67 Fed. Reg. 10767 (Mar. 8, 2002). *See also* TA-W-39743, A, B, C & D (Jan. 3, 2002).

tion. The plaintiffs call attention to the fact that those petitioners were former employees of DuPont that DuPont had chosen to outsource to Computer Sciences Corporation, an entity apart from DuPont, for “business reasons.” In TA-W-40,910,<sup>18</sup> according to the plaintiffs, those former employees who received certification were employed by Stein Mill Services, Inc., a company unrelated to LTV, and were engaged in the “*processing* of slag and scrap” from LTV’s steelmaking operations at Cleveland, Ohio. Benefits were awarded because they were determined to have been involved in the “production” of an article. Such decisions, the plaintiffs argue, are precedent for determining that their job duties were integral to the “production” of an import-impacted article and that the ETA’s investigation of their own circumstance was inadequate.

The government distinguishes *Computer Sciences* on the ground that the ETA concluded that those former workers were considered “production” workers and not “service” workers. See Pl.s’ Br., Ex. 5 at “Attachment 2” (Computer Sciences company contracted to provide “systems and technical support” for computers that controlled production process at production plants; petitioners certified as “production” workers).<sup>19</sup> It argues that the facts here are more akin to those of *Stanley Smith, supra*, which concerned former workers who had provided security services for the Trojan Nuclear Power plant in Rainer, Oregon, owned and operated by Portland General Electric (“PGE”). Trojan’s cessation of production was attributable to an import-impacted “article” (electricity). Terminated PGE employees received TAA, however the 120 Stanley Smith employees did not. They brought suit invoking the authority of *Abbott v. Donovan, supra*, and in affirming denial of their petition the court appeared to focus on the fact that the plaintiffs’ employer was not PGE.

The plaintiffs here, in turn, distinguish *Stanley Smith* on the ground that it is unclear whether the employees were “outsourced” by their former employer. They also point out that PGE had “no authority” over the employees and did not supervise or train them and that they were not “involved” in the production of electricity. *Id.* at 13, referencing 967 F.Supp. at 514. Furthermore, the plaintiffs point out, that court specifically noted that the claimants did not allege that they had been affiliated with, controlled, or owned by PGE. *Id.*, referencing 967 F.Supp. at 516 n.10. The plaintiffs maintain that their own situation is different in that they constitute a discreet “outsourced” group from LTV and that they *are* alleging what the claimants in *Stanley Smith* did *not*.

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<sup>18</sup> TA-W-40,910 (Apr. 29, 2002). See *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 35142 (May 17, 2002) (Stein Steel Mill Services, Inc Employed at LTV Steel, Inc. Cleveland Ohio).

<sup>19</sup> The Court further notes that workers engaged in “development work” at LTV’s Technology Center in Independence received TAA benefits, TA-W-40,724 (Mar 21, 2002), along with workers at “LTV Railroad Companies” including Cuyahoga Valley Railway Co., River Terminal Railway Co., and Chicago Short Line Railway Company, TA-W-40,786 & A, B (Jan. 14, 2001), and Loraine Pellet Terminal, Loraine, OH, TA-W-41,030 (Feb. 8, 2001). See 67 Fed. Reg. 15224 (Mar. 29, 2002).

The “service” worker analysis concerns “a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control.” “Control” is not synonymous with “ownership.” It is the power to manage or direct. *See Spirides v. Reinhardt, supra*, 613 F.2d at 832–33. *Cf.* 19 U.S.C. § 1677(33); 29 C.F.R. § 90.2 (a “firm \* \* \* together with any affiliated firm controlled or substantially beneficially owned by substantially the same persons[ ] may be considered a single firm.”). Congress was more concerned with remedying job losses as the result of import competition than with piercing corporate veils. *See* 19 U.S.C. § 2102(4) (the “purposes of this chapter” include, *inter alia*, assistance to “industries, firm, [*sic*] workers, and communities to adjust to changes in international trade flows”). The relevant inquiry on this trade adjustment assistance petition is whether petitioners were engaged in jobs that were integrated into or integral to “production” of steel at LTV facilities and that were lost due to import competition.<sup>20</sup> Whether such jobs were outsourced would strengthen the argument for eligibility, but, regardless, the focus is on which entity exercised actual control over them, not which entity nominally staffed them. *See* TA–W–39,535, *supra*.

#### CONCLUSION

For the foregoing reasons, this matter shall be remanded to the U.S. Department of Labor, Office of Employment and Training Administration, for redetermination consistent with this Opinion of whether the plaintiffs were eligible for TAA benefits, either as “production” workers or “service” workers. Or both.



(Slip Op. 03–22)

MARINE HARVEST (CHILE) S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 01–00808

(Dated March 4, 2003)

#### JUDGMENT

BARZILAY, *Judge*: This court, having received and reviewed the United States Department of Commerce, International Trade Administration’s (“Commerce”) *Final Results of Redetermination Pursuant to Court Remand* (“Remand Results”) in *Marine Harvest (Chile) S.A. v. United States*, Slip Op. 02–134 (Oct. 31, 2002), and Commerce having complied with the Court’s Remand Order, and plaintiff having no objec-

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<sup>20</sup> The government’s argument on the *Computer Sciences* petition (TA–W–39,535) rather highlights that straightforward interpretation and application of the TAA statute would appear to render the so-called “service” worker analysis, an adjunct inquiry, unnecessary.

tion to Commerce's Remand Results, and good cause appearing therefore, it is hereby

ORDERED that the Remand Results filed by Commerce on January 17, 2003, are sustained in their entirety; and it is further

ORDERED that this case is dismissed.

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(Slip Op. 03-24)

FORMER EMPLOYEES OF TYCO ELECTRONICS, FIBER OPTICS DIVISION,  
PLAINTIFFS *v.* U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 02-00152

[Defendant's second Motion for Leave to File Voluntary Remand Results Out of Time is granted. Plaintiffs' Motion for NAFTA-TAA Certification, Reasonable Attorney's Fees, and Dismissal of the Case is denied in part and granted in part. Plaintiffs' claim for NAFTA-TAA Certification and Dismissal is denied. Plaintiffs' request for Reasonable Attorney's Fees is granted.]

(Dated March 5, 2003)

*Williams Mullen, P.C.*, (*Jimmie V. Reyna, Francisco J. Orellana*) for Plaintiffs.  
*Robert D. McCallum, Jr.*, Assistant Attorney General, *David M. Cohen*, Director, *Lucius B. Lau*, Assistant Director, *John N. Maher*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jay Reddy*, Office of the Solicitor, U.S. Department of Labor, Of Counsel, for Defendant.

#### OPINION

CARMAN, *Chief Judge*: This matter comes before the Court on Defendant's, the United States Department of Labor ("Labor"), second Motion for Leave to File the Remand Results Out of Time and Plaintiffs' Motion for NAFTA-TAA Certification, Reasonable Attorney's Fees, and Dismissal of the Case. This Court has jurisdiction pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. 1581(d)(1) (2000). For the reasons set forth below, this Court grants Defendant's second Motion for Leave to File the Remand Results Out of Time. Further, this Court denies Plaintiffs' claim for NAFTA-TAA Certification and Dismissal of the Case and grants Plaintiffs' request for Reasonable Attorney's Fees. This action shall proceed as detailed in the order accompanying this opinion.

#### BACKGROUND

The parties have stipulated to the facts regarding the motions under consideration by the Court. (*Timeline Stipulation*, Jan. 29, 2003.) On August 7, 2002, this Court issued an order granting the parties' Consent Motion for Voluntary Remand to the Secretary of Labor for reconsideration of Plaintiffs' eligibility for certification for North American Free Trade Transitional Adjustment Assistance ("NAFTA-TAA") benefits.

(*Id.* at ¶ 1.) According to that order, the Remand Results were to be filed with the Court on or before October 7, 2002. (*Id.* at ¶ 2.) Labor failed to comply with the Court's order and did not submit a remand determination to this Court on or before October 7, 2002. Further, Labor did not file a motion for an extension of time on or before October 7, 2002.

On October 17, 2002, Plaintiffs submitted information to Defendant's counsel for use in the remand determination. (*Id.* at ¶ 3.) On November 12, 2002, Plaintiffs contacted Defendant to inquire about the status of the remand investigation. (*Id.* at ¶ 4.) At that time, Defendant's counsel informed Plaintiffs' counsel that the remand investigation had not started. (*Id.*) On November 14, 2002, Defendant filed its first Motion for Leave to File the Remand Results Out of Time. (*Id.* at ¶ 6.) Labor requested until January 6, 2003 to file the Remand Results. (*Id.*)

On December 4, 2002, Plaintiffs filed their Opposition to Defendant's Motion and a Cross-Motion for NAFTA-TAA Certification, Reasonable Attorney's Fees, and Dismissal of the Case. (*Id.* at ¶ 7.) On December 13, 2002, Defendant filed its Opposition to Plaintiffs' Cross-Motion. (*Id.* at ¶ 8.) On January 2, 2003, Defendant filed a second Motion for Leave to File Remand Results Out of Time. (*Id.* at ¶ 9.) This time, Labor requested until January 21, 2003 to file the Remand Results. On January 10, 2003, Plaintiffs filed their Opposition to Defendant's second Motion for Leave to File Remand Results Out of Time. (*Id.* at ¶ 10.) The Remand Results were filed with the Court on January 17, 2003. The parties participated in a telephone conference on January 28, 2003 called by the Court to discuss the pending motions. At the Court's request, Plaintiffs submitted a certified accounting of billable hours expended in response to Labor's Out of Time requests. (*Pls.' Attorney's Fees Submission*, Jan. 30, 2003). The itemized list of billable hours indicates, in separate columns, the date of the billable activity, a brief description of the billable activity, and the hours expended on the billable activity. (*Id.* at 1-3.) Plaintiffs' counsel appears in this action *pro bono*. Using the rates that Plaintiffs' counsel normally charges to clients, the requested attorney's fees amount to \$7,457.50 for 48.1 hours worked in response to Defendant's out of time motions. (*Id.*)

#### ANALYSIS

##### *I. Defendant's Second Motion for Leave to File the Remand Results Out of Time is Granted and Plaintiffs' Motion for NAFTA-TAA Certification and Dismissal of the Case is Denied.*

The United States Court of International Trade ("USCIT") Rule 6(b)(2) provides that a motion for an extension of time

"shall be filed prior to the expiration of the period allowed for the performance of the act to which the motion relates (including any previous extension of time); except, when for good cause shown the delay in filing was the result of excusable neglect or circumstance beyond the control of the party."

USCIT R. 6(b)(2) (2002). In accordance with USCIT Rule 1, Rule 6(b)(2) “shall be construed and administered to secure the just, speedy, and inexpensive determination” of this action. USCIT R. 1 (2002).

Defendant filed its first Motion for Leave to File Voluntary Remand Results Out of Time forty-five days after the Remand Results were due to be filed with this Court. Under Rule 6(b)(2), this Court must determine whether Defendant’s delay in filing its motion was due to Defendant’s “excusable neglect or circumstance beyond” its control. USCIT R. 6(b)(2). In other cases, this Court has reasoned that a finding of “excusable neglect requires an analysis of ‘all relevant circumstances surrounding the party’s omission \* \* \* [including] the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.’” *E.I. DuPont De Nemours & Co. v. United States*, 15 F. Supp. 2d 859, 861 (1998) (quoting *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship.*, 507 U.S. 308, 395 (1993)).

In support of its first Motion for Leave to File Voluntary Remand Results Out of Time, Defendant contends that it failed to file the Remand Results on time “due to a combination of the following: Labor’s Division of Trade Adjustment Assistance is experiencing severe personnel shortages but increased petitions; at present, approximately 10 investigators are responsible for approximately 1000 \* \* \* petitions; Labor is experiencing an increase in \* \* \* petitions because the current economic conditions have resulted in an increase in business closures; Labor is currently implementing a new Trade Act Program, broader in scope than current programs, that must be accomplished by the end of 2002; Labor’s Office of the Solicitor, Employment and Training Legal Services Division is also experiencing a personal shortage with an increasing caseload; and administrative oversight.” (Def.’s Mot. for Leave to File Voluntary Remand Results Out of Time at 1–2.)

Defendant states that its “need for additional time, out of time, was the result of a combination of personnel, logistical, administrative, workload, economic, and congressional challenges that formed the inadvertence that ultimately led to the necessity for additional time to complete the investigation and file the results.” (Def.’s Opp’n to Pls.’ Mot. for Certification, Attorney’s Fees, and Dismissal of the Case (“Def.’s Opp’n Br.”) at 3.) Specifically, Defendant states “administrative oversight” as the reason its Motion for Leave to File the Remand Results Out of Time was filed forty-five days after the Court’s due date. (*Id.* at 4.)

To explain its second Motion for Leave to File Remand Results Out of Time, Defendant contends that “despite Labor’s diligent efforts to complete the investigation, unforeseen events have prevented Labor from obtaining information necessary for a complete investigation.” (Def.’s [second] Mot. for Leave to File Voluntary Remand Results Out of Time at 1.)



Plaintiffs contend that Defendant's arguments do not demonstrate excusable neglect or circumstances beyond the control of the party as required by Rule 6(b)(2). (Mem. of P. & A. in Opp'n of Def.'s Mot. for Leave to File Remand Results Out of Time and In Supp. of Cross-Mot. for NAFTA-TAA Certification of Former Tyco Employees and Reasonable Attorney's Fees ("Pls.' Br.") at 10–11.) Plaintiffs contend that personnel shortages, administrative oversights, and increased workloads do not rise to the level of excusable neglect or circumstances beyond Defendant's control. (*Id.*) Plaintiffs contend that this Court should not grant Defendant leave to file the Remand Results out of time. (*Id.* at 11–12.)

In their Cross-Motion, Plaintiffs ask this Court to certify Plaintiffs as eligible to receive NAFTA-TAA benefits based upon the current record before the Court. (*Id.* at 12.) Plaintiffs contend that this case is similar to a prior case in which this Court ordered Labor to certify the plaintiffs after Labor failed to conduct an adequate investigation on remand. (*Id.* at 13 (citing *Former Employees of Barry Callebaut v. Herman*, No. 00–05–00202, slip op. at 25 (Ct. Int'l Trade Aug. 30, 2002).) In this case, Plaintiffs argue that Labor "not only ignored the Court's [o]rder to conduct an adequate investigation and to submit remand results by a certain date," Labor "never even started the remand investigation" within the time specified in the Court's order. (Pls.' Br. at 13.)

As previously stated, USCIT Rule 6(b)(2) provides that a motion for an extension of time "shall be filed prior to the expiration of the period allowed for the performance of the act to which the motion relates \* \* \* except, when for good cause shown the delay in filing was the result of excusable neglect or circumstance beyond the control of the party." USCIT R. 6(b)(2). This rule must be construed "to secure the just, speedy, and inexpensive determination" of this action. USCIT R. 1. This Court finds that Defendant's delay in filing was a result of excusable neglect. In so finding, this Court stresses that "administrative oversight" is barely excusable, and "personnel shortages" and "increased workloads" are weak reasons to justify a delayed filing. Because the Court finds that Labor did not act in willful disregard for the process of the Court and that the Remand Results are necessary to secure just results, Defendant's second Motion for Leave to File the Remand Results Out of Time is granted.

This Court declines to order certification of Plaintiffs. Under the circumstances, granting Plaintiffs' Motion for Certification based upon the current record before the Court would not be just. This was the first voluntary remand to the Department of Labor for reconsideration of Plaintiffs' petitions. The voluntary remand was agreed to by the parties because the underlying investigation contained in the current record was inadequate. The Remand Results, based upon additional investigation, are necessary to this Court's review of Plaintiffs' claim and therefore, Plaintiffs' Motion for NAFTA-TAA Certification and Dismissal of this case is denied.

## *II. Plaintiffs' Motion for Reasonable Attorney's Fees is Granted.*

Under USCIT Rule 16(f), if a party fails to comply with a scheduling order of this Court, “the judge shall require the [noncomplying] party \* \* \* to pay the reasonable expenses incurred because of any noncompliance with [a scheduling order], including attorney’s fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.” USCIT R. 16(f). Here, the Court finds that Labor’s noncompliance was not substantially justified and therefore, grants Plaintiffs’ request for reasonable attorney’s fees.

Rule 16(f) sanctions for noncompliance are presumptively appropriate. The rule specifically states that the Court shall require the noncomplying party to pay reasonable expenses incurred *unless* the party’s noncompliance was “substantially justified.” USCIT R. 16(f). USCIT Rule 16 is modeled after the Federal Rules of Civil Procedure’s (“FRCP”) Rule 16. FED. R. CIV. P. 16 (2002). When the Court’s rules are materially the same as the FRCP, the Court has found it appropriate to consider decisions and commentary on the FRCP in interpreting its own rules. *See Tomoegawa (U.S.A.), Inc. v. United States*, 763 F. Supp. 614, 617 (Ct. Int’l Trade 1991) (“[I]t is without question that this court may look to the decisions and commentary on the Federal Rules in the interpretation of its own rules.”) (citations omitted). USCIT Rule 16(f) is virtually identical to Rule 16(f) of the FRCP. *See* FED. R. CIV. P. 16.

The Advisory Committee Notes following FRCP Rule 16 state that “explicit reference to sanctions reenforces the rule’s intention to encourage forceful judicial management.” FED. R. CIV. P. 16 advisory committee’s notes. Negligent failure to comply with an order of the court is sufficient for sanctions under FRCP Rule 16(f). 3 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE—CIVIL* § 16.91 (3rd ed. 1999); *see also Harrell v. United States*, 117 F.R.D. 86, 89 (E.D.N.C. 1987) (imposing Rule 16(f) sanctions even where counsel’s conduct was “excusable and, at most, negligent”) (cited with approval in *Martin Family Trust v. Neco/Nostalgia Enters. Co.*, 186 F.R.D. 601, 604 (E.D. Cal. 1999); *Wellmore Coal Corp. v. Stiltner*, 81 F.3d 490, 496 n.8 (4th Cir. 1996)). “[T]here is no good faith exception to the requirement of obedience to a court order.” *Go-Video v. Motion Picture Ass’n of Am.*, 10 F.3d 693, 695 (9th Cir. 1993) (citing *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987)).

Plaintiffs move for sanctions under Rule 16(f) against Defendant in the form of reasonable attorney’s fees. (Pls.’ Br. at 13–14.) Plaintiffs contend that the facts surrounding Defendant’s violation of the Court’s order support sanctioning Defendant. (*Id.* at 14.) Plaintiffs contend that several factors weigh in favor of sanctions including the following: 1) Labor failed to initiate any investigation during the remand period established by the Court; 2) Even after Plaintiffs submitted unsolicited information to aid the investigation, Labor failed to take any action for more than a month; 3) Defendant did not take any action until contacted

a second time by Plaintiffs' counsel; 4) Labor did not seek leave to file the remand results until forty-five days after the Court's deadline expired; 5) Labor sought a second leave to file out of time after it failed to take action to complete the investigation within the first requested time period. (*Id.* at 14; *Timeline Stipulation* at ¶¶ 2–4, 6, 9.)

In its opposition brief, Defendant contends that “Labor’s noncompliance with the original deadline to file the remand results is substantially justified, for the reasons discussed above, and an award of expenses in this case would not be just in light of the facts and circumstances that reasonably explain Labor’s failure to meet the deadline.” (Def.’s Opp’n Br. at 8.)

As discussed above, the Court agrees that Labor’s noncompliance with the Court’s order was a result of the negligence of both Defendant’s counsel and the Department of Labor. However, this is not enough to satisfy the “substantially justified” benchmark set forth in Rule 16(f) nor do the circumstances indicate that an award of sanctions would be unjust.

In *Former Employees of Hewlett-Packard v. United States*, this Court declined to award attorney’s fees for a defendant’s failure to comply with the Court’s scheduling order. 17 CIT 328, 330 (1993). In *Hewlett-Packard*, the Court found that the defendant’s noncompliance was substantially justified under Rule 16(f). *Id.* In reaching its conclusion, the Court emphasized that the defendant’s reason for missing the filing deadline was that a secretary had “inadvertently omitted distributing the last page of the order, which contained the instruction to complete and submit the remand results” by a certain date. *Id.* at 329. The Court found that such circumstances were enough to substantially justify the defendant’s noncompliance. *Id.* at 330.

The facts behind Labor’s noncompliance in this case are distinguishable from those in *Hewlett-Packard*. Unlike the circumstance in *Hewlett-Packard*, the Defendant was fully aware at all times that the Remand Results were to be filed with this Court on or before October 7, 2002. Even with this knowledge, Defendant failed to initiate *any* investigation during the remand period ordered by the Court. (*Timeline Stipulation* at ¶ 4.) Additionally, Labor waited forty-five days after the Court’s deadline had passed, and almost one month after Plaintiffs’ counsel had sent unsolicited information to aid the investigation, to seek leave to file the Remand Results out of time. (*Id.* at ¶¶ 2–3.) While that motion was under consideration by the Court, Defendant submitted its second motion for leave after it had failed to take the necessary steps to complete the investigation within the first requested time frame. The Court also considers the fact that Plaintiffs’ counsel is appearing *pro bono* and has had to respond to Labor’s two unnecessarily delinquent motions. Labor is reminded that it is obliged to “conduct [its] investigation with the utmost regard for the interests of the petitioning workers.” *Stidham v. United States Dep’t of Labor*, 669 F. Supp. 432, 453 (1987) (citations omitted). Labor’s obligation includes conducting time-

ly investigations on remand and obeying the Court's scheduling orders. Under these circumstances, this Court finds that Defendant's noncompliance with the Court's order was not substantially justified. Therefore, Plaintiffs' request for Reasonable Attorney's Fees is granted.

The Court considers several factors in determining the amount of attorney's fees to award as sanctions against Defendant. Among the considerations are the reasonableness of the fees requested, the minimum that will serve to adequately deter the undesirable behavior, the severity of the violation, and the level of malice or bad faith. 3 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE—CIVIL* § 16.92 (3rd ed. 1999). Additionally, the Court considers whether the fault lies with the client or with counsel. *Id.* Rule 16(f) "does not create an entitlement to full compensation." *Kiser v. Boeing Co.*, 163 F.R.D. 13, 15 (D. Kan. 1995) ("[T]he basic principle underlying the imposition of sanctions \* \* \* based on \* \* \* Rule 16, is that the least severe sanctions adequate to serve the purpose should be utilized."). The purpose of Rule 16(f) sanctions is to deter undesirable conduct, not to fee shift. *Id.*

A review of Plaintiffs' counsel's submission indicates that Plaintiffs' counsel spent 48.1 hours working on their responses to Labor's two out of time requests. (*Pls.' Attorney's Fees Submission*, at 1–3.) The Court finds that Plaintiffs' representation of the amount of time required to respond to Labor's two motions is not excessive or wasteful. At the hourly rates normally charged by Plaintiffs' counsel, the total attorney's fees amount to \$7,457.50. (*Id.* at 3) In breaking down the total fees requested, Plaintiffs' counsel charged \$310 per hour for the work that the partner performed (4.6 hours); \$140 per hour for the associate's work (42.2 hours); and \$95 per hour for paralegal fees (1.3 hours). The Court finds that the hourly rates charged by Plaintiffs' counsel are also reasonable and are in line with those rates for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1993); *see also D&M Watch Corp. v. United States*, 795 F. Supp. 1172, 1178–1179 (Ct. Int'l Trade 1992) ("the requested rate of \$300 per hour [for partners] \* \* \* is not unreasonable"; "\$195 is not an unreasonable hourly rate [for associates]"); *Humane Soc'y of the U.S. v. Bush*, 159 F. Supp. 2d 707, 712 (Ct. Int'l Trade 2001) ("\$75 per hour is a reasonable rate [for a paralegal's services]").

Although Plaintiffs' submitted fees are reasonable, the Court finds that other factors weigh in favor of reducing the amount of the sanctions against Defendant. There is no indication of bad faith or malice on the part of Defendant's counsel or the Department of Labor. On the other hand, the Court notes that the Department of Labor failed to initiate any remand investigation during the time allotted by the Court's order, even after Plaintiffs' counsel contacted Defendants to inquire about the status of the investigation. Additionally, the Department of Labor was unable to complete the remand investigation within the time requested in the first motion for leave and Plaintiffs' counsel, appearing *pro bono*, was forced to respond to a second motion for leave. Considering the de-

linquent remand investigation that predicated the out of time motions, the Court finds that the Defendant, the Department of Labor, shall bear the sanctions. This Court awards attorney's fees to Plaintiffs in the amount of \$3,728.75, one half of the amount requested.

#### CONCLUSION

Defendant's second Motion for Leave to File Voluntary Remand Results Out of Time is granted. Plaintiffs' Motion for NAFTA-TAA Certification, Reasonable Attorney's Fees, and Dismissal of the Case is denied in part and granted in part. Plaintiffs' claim for NAFTA-TAA Certification and Dismissal is denied. Plaintiffs' request for Reasonable Attorney's Fees is granted. Defendant shall pay Plaintiffs an award of attorney fees in the amount of \$3,728.75 within sixty (60) days of this order.