Decisions of the United States Court of International Trade

(Slip Op. 02–126)

MARK YUAN-SHENG CHANG, PLAINTIFF *v.*
U.S. SECRETARY OF THE TREASURY, DEFENDANT

Court No. 02–00261

[Denial of customs broker's license sustained.]

(Dated October 24, 2002)

Mark Yuan-Sheng Chang, pro se.
Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John J. Mahon* and *Arthur J. Gribbin),* for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on defendant's motion for judgment upon the administrative record pursuant to USCIT Rule 56.1(a). Plaintiff Mark Yuan-Sheng Chang challenges the decision of the Deputy Assistant Secretary of the Department of Treasury ("Treasury") affirming the United States Customs Service's ("Customs") denial of his application for a customs broker's license.[1]

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1581(g)(1) (2000), the court has exclusive jurisdiction to review the denial of a customs broker's license. *See O'Quinn v. United States,* 100 F. Supp. 2d 1136, 1137 (Ct. Int'l Trade 2000). Findings of fact by the Secretary of the Treasury supporting a customs broker's license denial are conclusive unless they are not supported by substantial evidence. 19 U.S.C. § 1641(e)(3) (2000); *see also Bell v. United States,* 17 CIT 1220, 1223–25, 839 F. Supp. 874, 877–79

[1] The Secretary of the Treasury is authorized to decide appeals of a customs broker's license denial by Customs. The Secretary of the Treasury ("Secretary") has delegated this authority to the Deputy Assistant Secretary. *See Rudloff v. United States,* 19 CIT 1245, 1246 n.2 (1995), *aff'd,* 108 F.3d 1392 (Fed. Cir. 1997).

[2] The statute provides that under certain conditions additional evidence may be received by the court for further fact finding by the Secretary. *See* 19 U.S.C. § 1641(e)(4). This provision is not applicable here.

(1993).[2] The decision of the Assistant Secretary to deny a broker's license based upon those facts will be upheld unless arbitrary and capricious. *See O'Quinn,* 100 F. Supp. 2d at 1138 (reviewing a Treasury decision to deny a broker's license under the arbitrary and capricious standard as provided in the Administrative Procedures Act).

BACKGROUND

Plaintiff Mark Yuang-Sheng Chang applied for a customs broker's license ("license") on March 1, 2000. In order to obtain a license, an applicant must, among other things, pass both a written examination and background investigation. *See* 19 C.F.R. § 111.13 (examination); 19 C.F.R. § 111.14(d) (investigation). On April 3, 2000, Mr. Chang sat for and passed the written broker's examination. Customs then proceeded to investigate Mr. Chang's qualifications, integrity, character, and reputation as required by 19 C.F.R. § 111.14(d). In the course of its investigation, Customs determined that Mr. Chang had been involved in the mis-classification of goods in order to obtain a lower rate of duty. The discovery came about as a result of an unrelated investigation of two shoe importing companies.

Mr. Chang was employed as an entry writer at United Customhouse Brokers, Inc. ("UCB"), a Customs Broker. UCB was the designated broker for Peter's Shoes, an importer of athletic shoes. Customs investigated the mis-classification of a certain style of athletic shoe previously imported by Peter's Shoes. Customs determined that Peter's Shoes had mis-classified a particular style of shoe, along with several others, as made of leather when they were actually made of plastic in order to obtain a lower duty rate.[3] Mr. Chang prepared the entries on behalf of Peter's Shoes. As a result of the mis-classification, Customs issued a Custom Form 29 ("CF29") notifying Peter's Shoes of the proper classification and requesting that Peter's Shoes submit the correct duty owed.

Shortly thereafter, the owner of Peter's Shoes, Peter Zanag, and his wife formed a new importing company, Jenny Footwear,[4] to import those shoes that were the subject of the CF29's issued to Peter's Shoes.[5] The entries filed by Jenny Footwear on these shoes continued to classify the shoes as made of leather and to claim the lower duty rate of 8.5%. UCB was again the designated broker for Jenny Footwear and the entries were prepared by Mr. Chang.[6]

At a May 9, 2000 meeting held to investigate the entries, Mr. Chang was asked by a Customs Import Specialist Team Leader, Rene LaRue, why, after receiving the CF29's for Peter's Shoes, he had continued to mis-classify the same merchandise. Mr. Chang responded that Zanag had told him that the shoes were leather. In addition, Mr. Chang com-

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[3] At the time of the investigation, leather shoes carried a duty rate of 8.5% whereas plastic shoes carried a duty rate of 48% or 90 cents per pair plus 37.5% depending on the value of the shoe.

[4] The mailing address for Jenny Footwear was listed as Zanag's home address.

[5] Customs determined that the shoes were from the same supplier, and the merchandise, invoice and price were identical to those previously imported by Peter's Shoes. The only difference, according to Customs, was that the style number listed on the invoice had been changed from "918" to "951." Neither shoe was actually labeled with a style number.

[6] Mr. Chang no longer works for UCB.

mented that he was sympathetic towards Zanag because he had recently been robbed and was generally having a difficult time. Mr. Chang acknowledged that he was aware that Jenny Footwear and Peter's Shoes were related companies. Mr. Chang stated that he regretted disregarding the CF29's. On August 11, 2000, the Customs agent assigned to Mr. Chang's background check for the license again asked why he had disregarded the CF29's. Mr. Chang altered his response somewhat and stated that he did not fully understand some of the classification descriptions.

On September 11, 2000, Customs issued "Report of Investigation No. LA10CH00LA0041." Based on the findings in the report, the Assistant Port Director for U.S. Customs Service Trade Operations recommended that Mr. Chang's application be denied in accordance with 19 C.F.R. §§ 111.16(b)(1), (3) and (6),[7] for aiding and abetting an importer in the evasion of Customs duties, and assisting the importer in changing his identity to achieve this evasion. On January 19, 2001, the Assistant Commissioner, U.S. Customs Service, Office of Field Operations, notified Mr. Chang by letter that his application for a customs broker's license had been denied.

Pursuant to 19 C.F.R. § 111.17(a), Mr. Chang appealed the denial of his application by letter dated February 20, 2001. Mr. Chang argued that he had never dealt with a CF29 before, that he had relied on information provided by Peter's Shoes, and that his conduct was not intentional. Mr. Chang later presented an oral appeal by telephone to the Customs Service's Broker Licensing Review Board. Mr. Chang's appeal was denied.

Pursuant to 19 C.F.R. § 111.17(b), Mr. Chang appealed Custom's denial of his application by letter to the U.S. Department of the Treasury. A Treasury memorandum reviewing Chang's appeal noted, among other things, that he had failed to directly address his admission that he disregarded the CF29's. The memorandum also noted that the potential loss of revenue for these erroneous entries was at least $186,653.00 and that such conduct would be cause for suspension or revocation of a broker's license under 19 C.F.R. § 111.53. The memorandum recommended that the denial be upheld. On January 28, 2002, the Acting Deputy Assistant Secretary of the Department of Treasury, Timothy E. Skud, denied Mr. Chang's appeal by letter. This appeal followed.

As before, Mr. Chang challenges the denial of his application for a customs broker's license and, presumably, the subsequent decisions by Customs and Treasury affirming the denial. The Government argues that Customs properly denied Mr. Chang's application on the grounds specified in 19 C.F.R. §§ 111.16(b)(1), (3), and (6).

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[7] § 111.16 provides, in relevant part:

(b) Grounds for denial. The grounds sufficient to justify denial of an application for a license include, but need not be limited to:

(1) Any cause which would justify suspension or revocation of the license of a broker under the provisions of § 111.53;

* * * * * * *

(3) A failure to establish the business integrity and good character of the applicant;

* * * * * * *

(6) A reputation imputing to the applicant criminal, dishonest, or unethical conduct, or a record of that conduct.

DISCUSSION

Pursuant to 19 U.S.C. § 1641(b) (2000), no person may act as a customs broker without a license granted by the Secretary of Treasury. Section 1641(f) provides the Secretary with the authority to "prescribe such rules and regulations relating to the customs business of customs brokers * * * including rules and regulations governing the licensing of * * * customs brokers * * *." 19 C.F.R. § 111.16(b) sets out six specific, though not exclusive, grounds for the denial of a license application. "Customs regulations reasonably permit denial of broker's licenses to otherwise qualified persons based on, *inter alia,* lack of business integrity, engaging in unfair commercial practices, or having a reputation for dishonest or unethical conduct." *Portal v. United States,* 20 CIT 617, 618 (1996). This is consistent with the purpose of the broader statutory scheme regulating brokers as contained in 19 U.S.C. § 1641. *See United States v. Federal Ins. Co.,* 805 F.2d 1012, 1018 (Fed. Cir. 1986) (quoting S. Rep. No. 1170, 74th Cong., 1st Sess. 3 (1935)) ("[T]he corrupt practices of a few [brokers], unhampered by adequate statutory provisions for supervision, have proved a grave menace to importers and customs revenues alike. The present amendments are designed to remedy this situation."). "The entire Customs entry system depends on brokers' honesty." *Portal,* 20 CIT at 618.

After reviewing the evidence, the Secretary concluded that Mr. Chang actively participated in the mis-classification of merchandise. The Secretary denied Mr. Chang's application on grounds that his conduct indicated a lack of business integrity and good character, and was dishonest and unethical. Mr. Chang argues that he acted on information provided by the importer and did not fully understand the meaning of the CF29's and, therefore, did not intentionally mis-classify the shoes. Mr. Chang does not, however, dispute that he prepared the entries or that he was aware that the two shoe companies were related. Mr. Chang was, at minimum, on notice that the entries of similar shoes of the same material imported by essentially the same company should be classified consistently. Mr. Chang's repeated mis-classification in the face of that notice raises serious questions. Furthermore, Mr. Chang provided investigators incomplete and inconsistent explanations of the mis-classification.

"Under the applicable substantial evidence standard of review, the agency rather than the reviewing court weighs the evidence and determines its credibility." *Novosteel SA v. United States,* 128 F. Supp. 2d 720, 730 (Ct. Int'l Trade 2001) (discussing the substantial evidence standard in the context of a challenge to the scope of antidumping and countervailing duty orders); *see also Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990) ("It is not within the court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record."). While it is possible that Mr. Chang did not intentionally mis-classify the shoes, the court finds that the evidence presented substantially supports the conclusion that Mr.

Chang was actively involved in the mis-classification of merchandise to obtain a lower duty rate. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966). As a result, the court finds that the agency's determination that Chang actively participated in the misclassification of goods was supported by substantial evidence. The court further finds that the agency decision to deny Chang a broker license because of that mis-classification was not arbitrary and capricious and, therefore, is sustained.

CONCLUSION

For the foregoing reasons, the court finds that the decision of the Deputy Assistant Secretary of the Treasury to deny Mr. Chang's application was based upon substantial evidence and that sufficient grounds for denial of the customs broker's license existed under 19 C.F.R. § 111.16(b). Defendant's motion for summary judgment is granted.

(Slip Op. 02–127)

FORD MOTOR CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–03–00164

(Dated October 18, 2002)

ORDER

CARMAN, *Chief Judge:* On April 12, 2002, the United States Court of Appeals for the Federal Circuti reversed this Court's August 21, 2000 decision in the captioned case and remanded the case to this Court for entry of judgment in favor of Plaintiff, Ford Motor Company. *See Ford Motor Co. v. United States,* 286 F.3d 1335 (Fed. Cir. 2002). On August 7, 2002, the Federal Circuit denied the government's Petition for Rehearing and Suggestion for Rehearing En Banc. On August 14, 2002, the Federal Circuit issued its mandate ordering that the case is reversed and remanded.

In consideration thereof, it is hereby,

ORDERED that Judgment be, and hereby is, entered in favor of Plaintiff, Ford Motor Company; and it is further

ORDERED that the entries covered by this action, listed in Annex A hereto, be deemed liquidated by operation of law "as entered," under 19 U.S.C. § 1504(a) (1982); and it is further

ORDERED that Customs reliquidate the entries covered by this action in accordance with this Order and refund to Ford Motor Company the excess duties assessed together with interest from the date of deposit of

estimated duties to the date of reliquidation, pursuant to 19 U.S.C. § 1505(c).

So ordered.

ANNEX A

Entry Number	*Entry Date*
86–100089–6	12/30/1985
86–100084–1	01/02/1986
86–100085–4	01/03/1986
86–100086–7	01/07/1986
86–100087–0	01/10/1986
86–100088–3	01/13/1986
86–100090–6	01/09/1986
86–100091–9	01/17/1986
86–100092–2	01/24/1986
86–100093–5	01/31/1986
86–100127–7	02/07/1986

(Slip Op. 02–128)

G&R PRODUCE CO., ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT

Consolidated Court No. 96–11–02569

[Plaintiffs' Motion to Enter Judgment Pursuant to Test Case Findings is DENIED.]

(Decided October 24, 2002)

Givens and Associates, PLLC (Robert T. Givens, Scott L. Johnston), for Plaintiffs.

David W. Ogden, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice, *Amy M. Rubin,* Trial Attorney; *Beth C. Brotman,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for Defendant.

OPINION

I

PRELIMINARY STATEMENT

WALLACH, *Judge:* This consolidated group of cases comes before the court following the refusal by the United States Customs Service ("Customs" or the "Government") to stipulate judgment in each individual matter, pursuant to the court's holding in *Black & White Vegetable Co. v.*

United States, 125 F. Supp. 2d 531 (CIT 2000). Familiarity with the court's decision in *Black & White* is presumed.[1]

As the current consolidated cases were originally suspended under *Black & White,* a brief summary of that case adequately describes their posture. In *Black & White,* plaintiff challenged Customs' refusal to reliquidate certain imported shipments of "Persian limes." The limes were erroneously entered by the plaintiff's importer, under 0805.30.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which referred to "[L]imes (Citrus Aurantifolia)," *eo nomine,* at a duty rate of 2.2 cents per kilogram during 1993 and 1.9 cents per kilogram during 1994.[2] Customs subsequently classified and liquidated the limes under this subheading and imposed duties accordingly. However, limes of the *citrus latifolia* variety, should have been entered under the subheading 0805.90.00, HTSUS, at a duty rate of .9 percent *ad valorem* in 1993 and duty free in 1994.[3]

Following Customs' denial of the plaintiff's earlier filed protest, the plaintiff moved for summary judgment, claiming that reliquidation was required under 19 U.S.C. § 1520(c) (1988) due to the mistaken classification of the limes by its import broker and Customs.[4] Plaintiff claimed that Customs and its import broker were mistaken regarding the proper botanical designation for the limes and that mistake resulted in the misclassification. Customs admitted that its import specialists were also mistaken about the botanical name of the limes, but contended that the mistake was one of law, barring reliquidation under 19 U.S.C. § 1520(c). *Black & White,* 125 F. Supp. 2d at 534.

Plaintiff was granted summary judgment because the proper taxonomical classification of an imported botanical item is a question of fact and not part of the legal analysis for classification purposes. Although a mistake of fact had been committed with regard to the proper botanical classification by both the importer and Customs, the source of the mistake was irrelevant, provided that such mistake resulted in the erroneous classification. *Id.*

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[1] The current cases were formerly suspended under *Black & White Vegetable Co. v. United States,* 125 F. Supp. 2d 531 (CIT 2000), pursuant to USCIT R. 84, and would have been disposed of accordingly, had Customs not refused to reliquidate Plaintiffs' entries in accordance with *Black & White,* and subsequently denied Plaintiffs' protest. Customs asserts that due to unique factual circumstances of each case, these cases cannot properly be disposed of under *Black & White.* In response, Plaintiffs, G & R Produce Company, I. Kunik Company, Rio Produce Co., McAllen Fruit & Vegetable, Inc., Robert Ruiz, Inc., London Fruit, Inc., G-M Sales Co., Inc., Val-Verde Vegetable Co., Inc, Frontera Produce, Inc., Trevino International, Inc., and Limeco, Inc. have filed eleven separate but virtually identical Motions to Enter Judgment Pursuant to the Test Case Findings. Plaintiffs ask the court to dispose of the current cases under *Black & White. See* Plaintiffs' Motion to Enter Judgment Pursuant to Test Case Findings ("Plaintiffs' Motion"). The cases were consolidated for judicial economy and these motions will be treated as a single motion for summary judgment to reflect the consolidation.

[2] Subheading, 0805, HTSUS, provided for:

0805	Citrus fruit, fresh or dried:
0805.30	Lemons *(Citrus limon, Citrus limonum)* and limes *(Citrus aurantifolia):*
0805.30.40	Limes

[3] Subheading 0805.90.00, HTSUS, provided for

0805	Citrus fruit, fresh or dried:
0805.90.00	Other, including kumquats, citrons and bergamots

[4] All citations to 19 U.S.C. § 1520 in this opinion are to the 1988 version of the United States Code, which was in effect during the period of time relevant to this case. The statutory language of 19 U.S.C. § 1520 has since changed.

In this case, under this motion, Customs has provided depositions, documentation, and statements to support its argument that the court's findings in *Black & White* are not necessarily here applicable. That evidence suggests Customs import specialists may have misclassified the subject limes due to a misapprehension of the applicable tariff provision and not a misunderstanding of the correct botanical classification. Section 1520(c) requires only that a mistake of fact by either party result in the erroneous classification of the subject goods; Customs' submitted evidence precludes the court from granting summary judgment in favor of the Plaintiffs or the Defendant.[5] As it will be discussed at length below, there remains a genuine issue of material fact as to whether the Customs import specialists' mistake was factual or legal in nature. Accordingly, the case cannot be properly resolved by summary judgment based upon the evidence presented.

II

STANDARD OF REVIEW

Summary judgment is appropriate when "the 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 a judgment as a matter of law." USCIT R. 56(c). "This may be done by producing evidence showing the lack of any genuine issue of material fact or, where the non-moving party bears the burden of proof at trial, by demonstrating that the non-movant has failed to make a sufficient showing to establish the existence of an element essential to its case." *Black & White,* 125 F. Supp 2d at 536 (citing *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.,* 853 F.2d 1557, 1560 (Fed. Cir. 1988); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324–325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

In determining if a party has met its burden the court does not "weigh the evidence and determine the truth of the matter," but rather the court determines "whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court views all evidence in the light most favorable to the non-moving party, drawing inferences in the nonmovant's favor. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

III

ARGUMENTS

A. PLAINTIFFS ARGUE THAT CUSTOMS IS REQUIRED TO STIPULATE JUDGMENT ACCORDING TO THE HOLDING IN BLACK & WHITE

Plaintiffs assert that a remedial mistake of fact has been committed, that it is irrelevant to the court's analysis who committed the mistake,

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[5] Although the Defendant did not file a cross-motion for summary judgment, Defendant notes that the court may *sua sponte* grant judgment in favor of the non-moving party. Defendant's Supplemental Opposition to Plaintiff's Summary Judgment Motion at 3 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Peg Bandage, Inc. v. United States,* 17 CIT 1337 (1993); *Nat'l Presto Indus., Inc. v. West Bend Co.,* 76 F.3d 1185, 1188 (Fed. Cir. 1996)).

and that this case is properly disposed of by the holding in *Black & White.* In its Motion for Summary Judgment (the same language is employed in each of the original eleven motions), Plaintiffs assert that, "[t]he Court's finding of mistake of fact on Customs part in this regard extends to the instant case by reason of the identical circumstances * * * which it shares with *Black & White."* Plaintiffs' Motion to Enter Judgment Pursuant to Test Case Findings ("Plaintiffs' Motion") at 2.

Plaintiffs also maintain that Customs must stipulate judgment on the consolidated cases due to the doctrine of collateral estoppel. Plaintiffs claim that the current issues were litigated fully in *Black & White* and that Customs had a full and fair chance to defend its position in that case.

B. Defendant Argues that Customs is Permitted to Differentiate the Consolidated Cases from Black & White

Following the entry of judgment in *Black & White,* the government claims that it reviewed each of the eleven cases suspended under *Black & White* in order to determine whether there was any reason not to stipulate judgment. The Government says that:

> In reviewing the entry papers in those cases, it became apparent that the facts underlying these other cases were not the same as those found by the Court in *Black & White.* Specifically, while the correct botanical name for the limes in issue did not appear on the documentation for the entries in issue in *Black & White,* there are many instances in which entry documentation relating to (formerly) suspended cases sets forth the correct botanical name for the Persian limes. The existence of these documents indicates that the importers and/or their brokers knew the botanical name for Persian limes at the time of entry.

Defendant's Opposition to Plaintiff's Motion to Enter Judgment Pursuant to Test Case Findings ("Defendant's Opp.") at 7.

Customs refuses to stipulate judgment based on the assertion that the mistakes committed by Plaintiffs' brokers and Customs' import specialists were legal and not factual in nature. As such, Customs claims that relief under §1520(c) cannot lie. Customs bases its assertions on its re-review of the "entry papers from those cases combined with a re-review of the plaintiffs' discovery responses in *Black & White." Id.* at 11. According to Customs, these documents "strongly suggest[] that the limes in issue in these cases were not misclassified because anyone was mistaken as to the correct botanical name of the imported limes, but rather because everyone involved mistakenly assumed that all limes were classifiable in the only tariff provision that expressly contained the term 'limes,' *i.e.,* subheading 0805.30.40, HTSUS." *Id.*

IV

ANALYSIS

A. COLLATERAL ESTOPPEL DOES NOT AUTOMATICALLY BAR A PARTY FROM LITIGATING SUSPENDED CASES

The authority for test case/suspension procedure is found in USCIT R. 84. Under Rule 84(b), "an action may become a test case 'by order of the court upon a motion for test case designation made after issue is joined.'" *Gennerra Sportswear, Inc. v. United States,* 16 CIT 313, 314 (1992). In addition, "[a]n action may be suspended under a test case if the action involves a significant issue of fact or question of law which is the same as a significant issue of fact or question of law involved in the test case." USCIT R. 84(d).

The criteria and nature of test and suspended cases as articulated in *Gennerra Sportswear,* provides that:

> For actions involving a common question of law or fact, the test case/suspension procedure is an available alternative to procedures permitting consolidation of actions under USCIT R. 42(a). Both consolidation and the test case/suspension procedures serve to achieve economies of time, effort and expense, and to promote uniformity of decisions * * * *[T]he test case and the suspended actions maintain their separate identities. The result is that the final decision in the test case is not necessarily legally binding on the suspended actions*.

16 CIT at 314 (emphasis added).

Customs is attempting to differentiate the suspended cases and the test case based on the knowledge of the import brokers and the Customs import specialists at the time of entry, a factual inquiry. No authority was cited for the proposition that a test case holding collaterally estops either party from litigating facts differing from the test case.[6]

Collateral estoppel, which may preclude a party from relitigating an issue resolved in a prior case, does not foreclose a party from litigating the existence of different facts. Moreover, collateral estoppel precludes relitigation of only those issues actually litigated in the prior action, but not those issues which *might* have been litigated. *Nichols & Co., Inc. v. United States,* 447 F. Supp 455, 459 (Cust. Ct. 1978), *aff'd,* 66 CCPA 28, 586 F.2d 826 (1978). A party is collaterally estopped from litigating an issue when:

> (1) the issue presented is identical to one adjudicated in a prior case; (2) the issue was raised and "actually litigated" in that prior case; (3) the previous determination of that issue was "necessary" to the judgment rendered in the prior case; and (4) the party precluded was "fully represented" in the prior action.

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[6] The Plaintiffs had originally argued that Customs is bound because *Black & White* is a test case, and that the court should enter judgment in their favor and find the Government estopped by the court's decision in *Black & White.* Plaintiffs' Motion at 2. Plaintiffs cited no authority for this proposition and conceded during oral argument that the court was not bound by collateral estoppel to find for the plaintiff because of the decision in the prior test case.

Elkem Metals Co. v. United States, 135 F. Supp. 2d 1324, 1333 (CIT 2001) (quoting *Thomas v. Gen. Servs. Admin.,* 794 F.2d 661, 664 (Fed. Cir. 1986).

In an analogous situation, collateral estoppel has been held inapplicable in classification cases. *See Nichols,* 447 F. Supp at 460 (citing *United States v. Stone & Downer Co.,* 274 U.S. 225, 236, 47 S. Ct. 616, 71 L. Ed. 1013 (1927)). In *Stone,* the Supreme Court held that the decision by the Court of Customs Appeals on a classification issue was "not determinative" on a subsequent importation "of the same type of merchandise, by the same importer, even though the issues were the same." *Id.* The Court in *Stone* stated that, "there are constant differences as to proper classifications of similar importations. The evidence which may be presented in one case may be much varied in the next." 274 U.S. at 236.

Customs consented to a motion to designate *Black & White* as a test case, based on its understanding at the time that the legal issues between the cases appeared identical; the facts, however, were never stipulated as identical. Whether the Customs import specialists knew the proper botanical classification of the limes is the factual heart of this case. Customs is properly afforded the opportunity to litigate those facts for purposes of distinguishing the current consolidated cases from *Black & White.*

B. A Mistake of Fact Under § 1520(c) Can be That of Either the Importer or Customs

1. Reliquidation Under § 1520(c)

An importer may protest the classification of merchandise when the importer believes Customs has misinterpreted the applicable law and improperly classified the importer's merchandise. 19 U.S.C. § 1514 (1988)[7]; *see also Boast, Inc. v. United States,* 17 CIT 114, 116 (1993). Unless a protest is filed within ninety days of notice of liquidation, decisions regarding tariff treatment of merchandise are "final and conclusive upon all persons." 19 U.S.C. § 1514(a), (c)(2).

However, 19 U.S.C. § 1520(c)(1) expands the time for relief by allowing reliquidation of imported merchandise to correct clerical errors, mistakes of fact, or other inadvertencies not amounting to errors of law, if they are brought to the attention of the appropriate Customs officer within one year of the date of liquidation. Section 1520(c)(1) is not, however, a broad remedy for all decisions that are adverse to the importer, but rather "the statute offers 'limited relief in the situations defined therein.'" *PPG Indus., Inc. v. United States,* 7 CIT 118, 123 (1984) (citation omitted). Section 1520(c)(1) provides in relevant part:

> (c) Reliquidation of entry
>
> Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—

[7] All citations to 19 U.S.C. § 1514 in this opinion are to the 1988 version of the United States Code, which was in effect during the period of time relevant to this case. The statutory language of 19 U.S.C. § 1514 has since changed.

> (1) a clerical error, *mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence,* in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction.

19 U.S.C. § 1520(c)(1) (emphasis added).

Case law interpreting the statute emphasizes that "[s]ection 1520(c)(1) does not afford a second bite at the apple to importers who fail to challenge Customs' decision within the 90-day period set forth in § 1514 * * *. [U]nder no circumstances may the provisions of § 1520(c)(1) be employed to excuse the failure to satisfy the requirements of § 1514." *ITT Corp. v. United States,* 24 F.3d 1384, 1387 n.4 (Fed. Cir. 1994). *See also Boast, Inc.,* 17 CIT at 116 (stating that § 1520(c)(1) "is 'not an alternative to the normal liquidation-protest method of obtaining review' [under § 1514], but rather affords 'limited relief' where an unnoticed or unintentional error has been committed.") (quoting *Computime, Inc. v. United States,* 9 CIT 553, 556, 622 F. Supp. 1083, 1085 (1985) (further quotation and citations omitted)).

2. The Mistake of Fact Required Under § 1520(c) Need Not be That of Both Parties

In addition to finding that the plaintiff in *Black & White* had satisfactorily demonstrated that a factual mistake occurred, the court emphasized that a plaintiff seeking recovery under § 1520(c) need only demonstrate that *either* the importer or Customs was factually mistaken and that such mistake resulted in the erroneous classification. *Black & White* does not stand for the proposition that only a mistake of fact on the part of the importer or its broker can satisfy § 1520(c). *See Black & White,* 125 F. Supp. 2d at 540–43. Indeed, § 1520(c) is silent as to which party must make the mistake of fact, and in *Black & White* the court emphasized that point:

> In interpreting the definition of "mistake of fact" under § 1520(c), the *Chrysler* court stated that it "does not require a plaintiff to demonstrate evidence of the underlying *cause* or *reason* for its mistake of fact, and case law does not appear to support of [sic] such a requirement." * * * Hence the Plaintiff need only demonstrate "that either the importer or Customs had a mistaken belief as to the correct state of facts."

125 F. Supp. 2d at 543 (quoting *Chrysler Corp. v. United States,* 87 F. Supp. 2d 1339, 1352 (CIT 2000)) (emphasis added).

Relief is unavailable under § 1520(c) where the mistake that ultimately caused the erroneous classification was one of law. In *Black & White,* the court concluded that the unrebutted evidence of the Plaintiff's mistake coupled with Customs' admission in its Answer that "if the involved import specialist had understood the meaning of the term '*Citrus aurantifolia*' * * * the goods would have been classified as other,"

satisfied the mistake of fact requirement under § 1520(c). *Id.* at 535. Thus, the court found that the plaintiff's import broker and Customs had both committed a mistake of fact that resulted in the erroneous classification. *Id.* at 542.

3. BLACK & WHITE HELD THAT MISCLASSIFICATION OF IMPORTED GOODS, CAUSED BY A LACK OF ACCURATE INFORMATION CONCERNING THE GOODS, RESULTS IN A MISTAKE OF FACT

Section 1520(c) permits reliquidation in order to correct "a clerical error, *mistake of fact, or other inadvertence not amounting to an error in the construction of a law." Id.* (emphasis added). The court relied on the distinction between a mistake of fact and an error in the construction of a law for purposes of § 1520(c), which provides:

> [M]istakes of fact occur in instances where either (1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to. *Mistakes of law, on the other hand, occur where the facts are known,* but their legal consequences are not known or are believed to be different than they really are.

Executone Info. Sys. v. United States, 96 F.3d 1383, 1386 (Fed. Cir. 1996) (emphasis added) (quoting *Hambro Auto. Corp. v. United States,* 66 C.C.P.A. 113, 119, 603 F.2d 850, 855 (C.C.P.A. 1979)); *C.J. Tower & Sons, Inc. v. United States,* 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd,* 61 C.C.P.A. 90, 499 F.2d 1277 (1974) (stating that a mistake of fact exists where a person understands the facts to be different than they truly are, however, a mistake of law will exist where a person knows the facts but has a mistaken belief as to the legal consequences of those facts.); *Ford Motor Co. v. United States,* 157 F.3d 849, 857 (Fed. Cir. 1998) ("F]or an error to be correctable, it must * * * not qualify as an 'error in the construction of a law.'").

The court found that "[a]ccordingly, Black & White's mistake was based on lacking factual knowledge, namely the limes' proper botanical designation at the time of entry." *Black & White,* 125 F. Supp. 2d at 542. Moreover, the court clarified that as ignorance concerning the limes' proper botanical classification resulted in their misclassification, this mistake of fact sprang from the taxonomic characteristics of the limes and not the erroneous interpretation of tariff provisions:

> [T]he proper botanical classification of an imported botanical item is not part of the legal analysis for [tariff] classification purposes * * * Taxonomical classification is inherently factual; whether an import be fish or fowl, lemon or lime is a question resolved by qualities manifest in its nature. The misidentification here was derived from a misapprehension of the relation of those qualities to a taxonomical system, not one of legal classification.

Id. at 534, 544.

C. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PARTY OPPOSING SUMMARY JUDGMENT, A GENUINE ISSUE OF MATERIAL FACT EXISTS

Customs submitted a statement from a Customs import specialist team leader, in which she avers her state of mind at the time of entering the imported limes. Her statement is ambiguous as to whether she was aware of the limes' proper botanical classification.

Team leader Magdalena Gonzalez-Castilleja states, in relevant part:

> I, and the other import specialists on my team who shared in the responsibility of classifying [limes] * * * assumed that all imported limes, including the Persian limes at issue, were classified under subheading 0805.30.40, HTSUS, as "Citrus fruit, fresh or dried: * * * limes (Citrus aurantifolia)." The reason we made this assumption is that this was the only provision that contained the general term "limes." (This was also consistent with the manner in which limes had been classified under the former tariff schedule, as "limes" under TSUS item 147.22.) Likewise, I assumed that the provision for "Citrus fruit, fresh or dried: Other" in subheading 0805.90.00, HTSUS, covered citrus fruit other than limes.
>
> Although I was aware of the parenthetical language * * * setting forth the botanical term, "citrus aurantifolia," I did not realize at the time that this was a limitation on the types of limes that were classifiable in that provision. Rather, I assumed that the phrase "citrus aurantifolia" was synonymous with the term "limes" immediately preceding the parenthetical.

May 15, 2002, Declaration of Magdalena Gonzalez-Castilleja, Appendix to Defendant's Supplemental Opposition to Plaintiff's Summary Judgment Motion.

This statement does not clarify whether Customs import specialists were aware that the Persian limes are of the *citrus latifolia* variety and not the *citrus aurantifolia* variety. In addition, despite the evidence that the specialists received entry documents and invoices that made reference to the limes as being of the *citrus latifolia* variety, it is unclear whether this documentation apprised the specialists of the proper botanical classification. While it may be true the specialists classified the limes under the incorrect tariff provision because it referred to limes *eo nomine*, the court cannot ascertain whether being apprised of the limes' proper botanical classification would have altered the specialists' behavior. Certainly, it is possible, inter alia, that if the import specialists were indeed unaware that the limes are of the *citrus latifolia* variety, being apprised of this fact may have alerted them that the reference to *citrus aurantifolia* "was a limitation on the types of limes that were classifiable in that provision" and that their assumption "that the phrase 'citrus aurantifolia' was synonymous with the term 'limes' immediately preceding the parenthetical" was erroneous. In other words, Ms. Gonzalez-Castilleja's statement fails to clarify whether "the facts exist, but [were] unknown" to her and her teammates upon entering the limes. As it stands, this statement can plausibly support the assertion

that the Customs import specialists misclassified the limes due to a factual mistake.

Accordingly, the court concludes that a genuine issue of material fact exists as to whether the Customs import specialists were aware of the proper botanical classification of the limes, and moreover, the significance of their choice of tariff classification. Therefore, the court cannot grant summary judgment to either party.

VI

CONCLUSION

Defendant has introduced sufficient evidence to demonstrate the existence of a genuine issue of material fact. Therefore, summary judgment may not be granted. The only issue remaining for determination at trial is whether the Customs import specialists' mistake was legal or factual in nature.

For the foregoing reasons, Plaintiffs' Motion to Enter Judgment Pursuant to Test Case Findings is denied. Trial on the remaining issue will be held at the earliest convenience of the parties.[8]

(Slip Op. 02–129)

SKF USA INC., SKF GMBH, SKF FRANCE S.A., SARMA, SKF INDUSTRIE S.P.A., AND SKF SVERIGE AB, PLAINTIFFS, AND INA WÄLZLAGER SCHAEFFLER OHG AND INA USA CORP., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 00–09–00448

Plaintiffs, SKF USA Inc., SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A. and SKF Sverige AB (collectively "SKF"), and plaintiff-intervenors, INA Wälzlager Schaeffler oHG and INA USA Corporation (collectively "INA"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Final Results"),* 65 Fed. Reg. 49,219 (Aug. 11, 2000).

Specifically, SKF argues that Commerce acted unlawfully and without factual support by calculating constructed value ("CV") profit on a "class or kind basis" and excluding below-cost sales from the CV profit calculation.

INA argues that Commerce unlawfully calculated CV profit by using an aggregated "class or kind basis" and disregarding below-cost sales from the calculation of CV profit.

Held: SKF's 56.2 motion is granted. INA's 56.2 motion is granted. The case is remanded to Commerce to: (1) provide a reasonable explanation of why Commerce uses different def-

[8] Depositions of the Customs import specialists will be admitted as evidence at trial for all purposes relating to any relevant question of fact. The parties may, if they choose, call some or all of those individuals to testify.

initions of "foreign like product" when calculating constructed value; (2) explain the factual setting for the calculations at issue; (3) explain the actual methodology for Commerce's calculation of CV profit; (4) explain why Commerce's chosen methodology comports with the statute and the definition of "foreign like product" contained in 19 U.S.C. § 1677(16) (1994), and particularly the definition in subsection (C); and (5) to recalculate CV profit in a manner consistent with the statute if Commerce is not able to provide such explanations.

[SKF's 56.2 motion is granted. INA's 56.2 motion is granted. Case remanded.]

(Dated October 25, 2002.)

Steptoe & Johnson LLP (Herbert C. Shelley, Alice A. Kipel and Carrie A. Rhoads) for SKF USA Inc, SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A. and SKF Sverige AB, plaintiffs.

Arent Fox Kintner Plotkin & Kahn PLLC (Stephen L. Gibson) for INA Wälzlager Schaeffler oHG and INA USA Corporation, plaintiff-intervenors.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis,* Assistant Director, and *Claudia Burke);* of counsel: *David R. Mason,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Stewart and Stewart (Terence P. Stewart, Geert De Prest and *Lane S. Hurewitz)* for The Torrington Company, defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, SKF USA Inc., SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A. and SKF Sverige AB (collectively "SKF"), and plaintiff-intervenors, INA Wälzlager Schaeffler oHG and INA USA Corporation (collectively "INA"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Final Results"),* 65 Fed. Reg. 49,219 (Aug. 11, 2000).

Specifically, SKF argues that Commerce acted unlawfully and without factual support by calculating constructed value ("CV") profit on a "class or kind basis" and excluding below-cost sales from the CV profit calculation.

INA argues that Commerce unlawfully calculated CV profit by using an aggregated "class or kind basis" and disregarding below-cost sales from the calculation of CV profit.

BACKGROUND

The administrative review at issue covers the period of review ("POR") from May 1, 1998, through April 30, 1999.[1] Commerce published the preliminary results of the subject review on April 6, 2000. *See Preliminary Results of Antidumping Duty Administrative Reviews,*

[1] Since the administrative review at issue was initiated after January 1, 1995, the applicable law is the antidumping statute amended by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995).

Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Orders in Part of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 65 Fed. Reg. 18,033 (Apr. 6, 2000). On August 11, 2000, Commerce published the Final Results at issue. *See Final Results,* 65 Fed. Reg. 49,219.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (2000) and 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of Am. v. United States,* 24 CIT ___, ___, 104 F. Supp. 2d 110, 115–16 (2000) (detailing the Court's standard of review for antidumping proceedings).

DISCUSSION

I. Commerce's CV Profit Calculation

A. Background

The enactment of the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) ("URAA"), which governs the case at bar, introduced a number of changes in the antidumping law. Specifically, the CV provisions relating to profit determination were altered to provide for: (1) a preferable method based upon the actual amounts incurred and realized by the particular party being reviewed, *see* 19 U.S.C. § 1677b(e)(2)(A) (1994); and (2) alternative methods that are to be used when actual data are not available. *See* 19 U.S.C. § 1677b(e)(2)(B) (1994). Specifically, Commerce is to rely in its calculations on

> the actual amounts incurred and realized by the specific exporter or producer being examined in the * * * review for * * * profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, [unless,] if actual data are not available with respect to the[se] amounts * * *, then [Commerce is to rely in its calculations on: (1)] * * * the actual amounts incurred and realized by the specific exporter or producer being examined in the * * * review for * * * profits, in connection with the production and sale [of a foreign like product], for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise[; (2)] the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the * * * review (other than the exporter or producer described in clause [(1)]) for * * * profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[;] or [(3)] the amounts incurred and realized for * * * profits, based on any other reasonable method, except

> that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause [(1)] in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise * * *.

19 U.S.C. § 1677b(e) (1994).

The URAA also amended the definition of the term "ordinary course of trade" to provide that below-cost sales that Commerce disregards in the determination of normal value ("NV") under 19 U.S.C. § 1677b(a) (1994) fall outside the "ordinary course of trade." Generally,

> [t]he term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. [Commerce] shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: * * * [s]ales disregarded under [19 U.S.C. §] 1677b(b)(1) [(1994)] * * *.

19 U.S.C. § 1677(15) (1994).

Section 1677b(b)(1) provides, in turn, that certain below-cost sales are to be disregarded in the determination of NV. Specifically, it provides that

> [if Commerce] determines that sales made at less than the cost of production[] * * * have been made within an extended period of time in substantial quantities, and [such sales] were not at prices which permit recovery of all costs within a reasonable period of time, such sales may be disregarded in the determination of [NV]. Whenever such sales are disregarded, [NV] shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, [NV] shall be based on [CV] of the merchandise.

19 U.S.C. § 1677b(b)(1) (1994).

Moreover, the Statement of Administrative Action, a document that represents an authoritative expression regarding the interpretation and application of the URAA for purposes of United States domestic law, provides that 19 U.S.C. § 1677b(e)(2)(A)

> establishes as a general rule that Commerce will base amounts for * * * profit only on amounts incurred and realized in connection with sales in the ordinary course of trade of the particular merchandise in question (foreign like product). Commerce may ignore sales that it disregards as a basis for [NV], such as those disregarded because they are made at below-cost prices.

H.R. DOC. 103–316 at 839 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4175–76.

For this POR, Commerce calculated CV profit for antifriction bearings pursuant to the methodology set forth in 19 U.S.C. § 1677b(e)(2)(A) (1994), "using aggregate data that encompassed all foreign like products under consideration for NV, rather than determining profit on a

model-or product-specific basis." Def.'s Mem. Opp'n Mots. J. Agency R. ("Def.'s Mem.") at 2. Specifically, Commerce determined a separate "profit ratio" for SKF and INA by calculating "profit for each sale of the foreign like product in the ordinary course of trade by subtracting all costs and expenses from the home market price." *Id.* at 8. Commerce then aggregated "the profit for all sales at the same level of trade and divided this [sum] by [SKF and INA's] aggregate cost totals for the same sales." *Id.* (citation omitted). In Commerce's calculation of CV profit, Commerce also excluded below-cost sales, which it disregarded in the determination of NV pursuant to 19 U.S.C. § 1677b(b)(1) (1994). *See id.* at 3.

B. Contentions of the Parties

SKF and INA contend that Commerce failed to comply with the plain language of 19 U.S.C. § 1677b(e)(2)(A) when calculating CV profit and, therefore, acted unreasonably and contrary to law. *See* Br. Supp. SKF's R. 56.2 Mot. J. Agency R. ("SKF's Br.") at 7–10,; Br. Pl.-Intervenors INA Supp. R. 56.2 Mot. J. Agency R. ("INA's Br.") at 2–3, 7–10. In particular, SKF and INA argue that 19 U.S.C. § 1677b(e)(2)(A) does not permit Commerce to calculate CV profit on an aggregated "class or kind basis" and to exclude sales of merchandise outside the ordinary course of trade.[2] *See* SKF's Br. at 9; INA's Br. at 5 (citing Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom—May 1, 1998, through April 30, 1999 at cmt. 57); *see also* Def.'s Mem. at Ex. A. SKF and INA assert that Commerce should have relied on an alternative methodology, as provided for in 19 U.S.C. § 1677b(e)(2)(B)(i) (1994), that allows Commerce to calculate CV profit on an aggregate basis and does not limit the CV profit calculation to

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[2] SKF states that "under the post-URAA law, the rules for the CV profit calculation differ depending on whether the calculation is performed on a foreign like product basis[, therefore triggering 19 U.S.C. § 1677b(e)(2)(A)], or is based on the same general category of products as the subject merchandise * * *." SKF Br. at 9. SKF argues that although Commerce purports to have calculated CV profit in accordance with 19 U.S.C. § 1677b(e)(2)(A), Commerce's class or kind cumulation actually fits within the statutory parameters of 19 U.S.C. § 1677b(e)(2)(B)(i), and that this secondary methodology does not mandate the exclusion of sales outside the ordinary course of trade. *See id.* at 10. However, "despite [Commerce's] reliance on the [class or kind] bas[is] specified in [19 U.S.C. § 1677b(e)(2)(B)(i), Commerce] nonetheless chose also to impose the ordinary course of trade limitation contained in [19 U.S.C. § 1677b(e)(2)(A)]." *Id.* Although both methods are "mutually exclusive," SKF maintains that Commerce "cannot lawfully adopt a methodology whereby [Commerce] chooses part of a formula from the first method and another part from the second method." *Id.*

SKF further argues that the statutory language of 19 U.S.C. § 1677b(e)(2)(A) "limits the universe of products that may be aggregated for purposes of the CV profit calculation," *id.* at 11, while 19 U.S.C. § 1677b(e)(2)(B)(i) allows for the use of a broader universe of products. *See id.* at 12; *see also* 19 U.S.C. § 1677b(e)(2)(A)(i). Section 1677b(e)(2)(A) of Title 19 requires that the CV profit calculation be an amount equal to the sum of "the actual amounts incurred * * * in connection with the production and sale of a foreign like product," while 19 U.S.C. § 1677b(e)(2)(B)(i) calls for the reliance of "merchandise that is in the same general category of products as the subject merchandise." *See* SKF's Br. at 11. SKF urges that this difference in statutory language not be ignored. *See id.*

Section 1677(16) defines the term "foreign like product" as merchandise identical to the merchandise at issue, similar to the merchandise at issue and "of the same general class or kind" that may be reasonably compared with the merchandise at issue. *See* 19 U.S.C. § 1677(16). According to Commerce, the language of 19 U.S.C. § 1677(16) "establishes a descending hierarchy, articulating preferences for the type of foreign like product that Commerce must select for matching purposes * * * [and] Commerce has * * * discretion in determining when to select a particular category of the 'foreign like product.'" Def.'s Mem. at 14. Commerce further contends that the use of the term "foreign like product" in 19 U.S.C. § 1677b(e)(2)(A) does not indicate Congress' intent that Commerce is restricted to using only "identical" merchandise in its CV profit calculation. *See id.* at 14–15. If such were Congress' intent, Commerce maintains that 19 U.S.C. § 1677b(e)(2)(A) would rarely be applicable. *See id.* at 15.

sales in the ordinary course of trade, thus not excluding below-cost sales in the calculation. *See* SKF's Br. at 7, 9–10; INA's Br. at 3, 16–17.

Commerce contends that it properly calculated CV profit, pursuant to 19 U.S.C. § 1677b(e)(2)(A), by using aggregate data that encompassed all foreign like products under consideration for NV. *See* Def.'s Mem. at 2, 7–8. Consequently, Commerce maintains that since it properly calculated CV profit, the exclusion of below-cost sales, which it had disregarded in the determination of price-based NV, was also proper. *See id.* at 3. Torrington generally agrees with Commerce's contentions.[3] *See* Resp. Torrington Co., Def.-Intervenor, Rule 56.2 Mot. Of SKF ("Torrington's Resp.") at 5–15.

C. Analysis

The decision of the United States Court of Appeals for the Federal Circuit ("CAFC") in *SKF USA Inc. v. United States,* 263 F.3d 1369 (Fed. Cir. 2001), provides that "Commerce cannot give the term 'foreign like product' a different definition (at least in the same proceeding) when making * * * the CV [profit] determination." *SKF USA Inc.,* 263 F.3d at 1382. If differing definitions of the term "foreign like product" are to be used, Commerce must supply a reasonable explanation for this discrepancy. *See Transactive Corp. v. United States,* 91 F.3d 232, 237 (D.C. Cir. 1996). Once Commerce has selected its actual methodology for the calculation of CV profit, "it should explain why its methodology comports with the statute." *SKF USA Inc.,* 263 F.3d at 1383.

Given the complexity of the antidumping statute, the Court relies on Commerce to provide clear explanations of its determinations. *See id.* at 1382–83. Commerce has not provided such an explanation regarding its CV profit calculation in the case at bar. Specifically, Commerce has not clearly stated which statutory definition of the term "foreign like product" Commerce used in it's calculation of CV profit. "Although the statutory definition of 'foreign like product' is ambiguous in many respects, and Commerce certainly has an important role in resolving those ambiguities and considerable discretion in defining 'foreign like product,' * * * its discretion is not absolute." *Id.* at 1381. Commerce must provide an explanation of the actual methodology used by Commerce to calculate CV profit, and clearly state what definition of the term "foreign like product" Commerce used in the contested CV profit calculation. *See id.* at 1382.

In light of the CAFC's decision in *SKF USA Inc.*, 236 F.3d 1369, this matter is remanded to Commerce.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce to (1) provide a reasonable explanation of why Commerce uses different definitions of "foreign like product" when calculating constructed val-

[3] Torrington disagrees with SKF's claim that two separate issues are pending before the Court. *See* Torrington's Resp. at 3 n.3. Torrington contends that SKF's brief merely raises two sub-arguments to a single issue that is pending before the Court. *See id.* The Court agrees with Torrington and will only address the issue of whether Commerce's calculation of CV profit pursuant to 19 U.S.C. § 1677b(e)(2)(A) was reasonable and in accordance with law.

ue; (2) explain the factual setting for the calculations at issue; (3) explain the actual methodology for Commerce's calculation of CV profit; (4) explain why Commerce's chosen methodology comports with the statute and the definition of "foreign like product" contained in 19 U.S.C. § 1677(16), and particularly the definition in subsection (C); and (5) to recalculate CV profit in a manner consistent with the statute if Commerce is not able to provide such explanations.

(Slip Op. 02–130)

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

Court No. 99–03–00178

[Judgment for Defendant.]

(Dated October 25, 2002)

Barnes, Richardson & Colburn (Lawrence M. Friedman, Harvey Karlovac and *Robert F. Seely),* for plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *John J. Mahon,* Attorney-in-Charge, International Trade Field Office, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis* and *Aimee Lee), Karen P. Binder,* Office of Assistant Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court for decision following trial. The court previously opined that material facts were at issue as to whether the painting of truck bodies after assembly in Mexico disqualified the imported Model Years 1993 and 1994 pickup trucks from a duty exemption for United States manufactured parts pursuant to subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States ("HTSUS") (codified at 19 U.S.C. § 1202 (1994)) and 19 C.F.R. § 10.16 (1999). *See Daimler Chrysler Corp. v. United States,* No. 99–03–00178, Slip Op. No. 00–124 (Ct. Int'l Trade Sept. 29, 2000). Familiarity with that opinion is presumed. For ease of reference, an appendix is attached containing the two principal provisions of law applicable to this dispute.

BACKGROUND

As a preliminary matter, defendant requests remand to the United States Customs Service ("Customs") in order for it to provide a comprehensive interpretation of its regulations. Given the long history of the auto painting wars[1] and the existence of the applicable regulation since 1975, *see* 40 Fed. Reg. 43023 (Sept. 18, 1975), defendant should have re-

[1] *See, e.g., General Motors Corp. v. United States,* 976 F.2d 716 (Fed. Cir. 1992); *Chrysler Corp. v. United States,* 19 CIT 353 (1995), *aff'd,* 86 F.3d 1173 (Fed. Cir. 1996) (unpublished).

quested such relief before trial. Furthermore, the words of the regulation itself are not unclear, they are merely difficult to apply to these particular facts.

Under HTSUS subheading 1902.00.80, operations "not incidental to the assembly process" disqualify U.S. manufactured parts assembled abroad from the otherwise applicable duty exemption. The issue before the court is whether, under the applicable regulation, the two top paint coats, a base color coat and a clear coat, are "primarily intended to enhance the appearance of" or "to impart distinctive features or characteristics" to the truck bodies at issue. *See* 19 C.F.R. § 10.16(c)(3) (providing examples of operations *not* incidental to assembly). Conversely, "application of preservative paint or coating" is an example of an operation incidental to assembly, which maintains the exemption. *See* 19 C.F.R. § 10.16(b)(3). The court has determined that it should not resort to the ambiguous general introductory language of 19 C.F.R. § 10.16(c) defining "not incidental" processes ("any significant process, operation, or treatment other than assembly whose primary purpose is the * * * completion * * * of a component. * * *"), or even to 19 C.F.R. § 10.16(c)(5) (relating to processes imparting new characteristics or qualities) unless it cannot resolve this matter on the basis of 19 C.F.R. § 10.16(b)(3) and § 10.16(c)(3), the provisions of the regulation addressing "paint." As Customs published specific provisions indicating how painting and coating should be treated under the relevant HTSUS subheading, those specific provisions control. Resort to a more general test risks reversion to standards not unlike the discredited *"Mast"* factors. *See United States v. Haggar Apparel Co.* 526 U.S. 380, 393 (1999) (abrogating test enumerated in *United States v. Mast Indus., Inc.,* 668 F.2d 501, 505 (Fed. Cir. 1981), which provided a variety of quantitative factors for determining what is a minor process incidental to assembly).

FINDINGS OF FACT

The following facts are uncontested:

1. Protest numbers 2304–93–10006, 2304–93–100117, 2304–93–100317 were timely filed.
2. Chrysler Motors Corporation ("Chrysler"), now DaimlerChrysler Corporation, was the importer of record for the entries covered by the protests.
3. On September 29, 1998, Customs denied the protests in full.[2]
4. The merchandise at issue consists of Model Year 1993 and 1994 Chrysler pickup trucks produced by Chrysler de Mexico.
5. The cargo boxes for the vehicles were produced at the Pemsa plant at Celeya, Mexico, in part from U.S.-origin stamped sheet metal components.
6. The vehicles were produced at Lago Alberto, Mexico, in part from U.S.-origin stamped sheet metal components.

[2] Suit was timely filed challenging the protest denials, pursuant to 28 U.S.C. § 1581(a) (1994).

7. The cab and cargo boxes were subjected to a painting process that consisted of the following operations:

a. cleaning and rinsing
b. application of zinc phosphate
c. application of a spray prime to cab
d. application of an electrodeposition primer to cargo box
e. application of a color coat
f. application of a clear coat

8. The primary purpose of primer coat is to prevent corrosion of the sheet metal.

9. Each vehicle was offered to consumers in approximately 10 to 12 color choices.

10. PPG Industries was the sole supplier of primer and paint to the Pemsa and Lago Alberto plants for application to sheet metal body components.

11. The selection of colors to offer to consumers was made by the Product Design Office at Chrysler World Headquarters in Michigan.

12. The Director of the Product Design Office is currently Margaret L. Haackstedde.

13. Chrysler Market Research personnel do not conduct or sponsor research on consumer color preferences.

14. For the vehicles at issue, Chrysler warrantied the sheet metal to be free of rust perforation for 36 months and unlimited mileage for any body sheet metal panel, and seven years or 100,000 miles, whichever occurs first, for outer-body sheet metal panels for the 1993 and 1994 model years.

15. Chrysler includes a group known as Paint Materials Engineering.

16. Paint Materials Engineering is responsible for the development and enforcement of materials standards for materials used in the production of Chrysler motor vehicles.

17. Thomas J. Bjelica was a Grade A Engineer in 1993, the senior engineer in 1994, and is currently supervisor in the Paint Materials Engineering Group.

18. During production of the vehicles at issue, Chrysler maintained and enforced materials standards for primer coat, color coat, and clear coat.

19. No prime, paint, or clear coat may be employed in production at any plant, including Lago Alberto, unless that material meets the relevant materials standard.

20. Chrysler required PPG to perform tests to determine that the materials met the relevant standards.

21. All of the coatings used on the vehicles at issue met the relevant Chrysler materials standards.

22. No process existed to waive application of the materials standards.

23. Relevant characteristics included in the materials standards were, but not limited to:

a. Hardness
b. Hiding

c. UV transmissivity
d. Chip resistance
e. Scratch resistance
f. Adhesion to the substrate
g. Gloss
h. Distinctness of Image

24. Hiding is a measure of the ability of the coating at a particular film thickness to hide patterns in the underlying substrate.

25. UV transmissivity is a measure of the ability of the coating to prevent the transmission of ultraviolet radiation to the substrate.

26. Chip resistance is a measure of the ability of the coating to withstand damage from impacts by small rocks and similar objects.

27. Scratch resistance is a measure of the ability of the coating to withstand lateral impacts along a surface.

28. Adhesion is a measure of the ability of the coating to remain affixed to the substrate to which it has been applied. The substrate may be metal, prime, or base coat paints.

29. Gloss is a measure of the reflected light from the coating surface.

30. Distinctness of image ("DOI") is a measure of the quality of the reflected image in a coated surface.

31. Gloss and DOI are characteristics relating solely to the appearance of the coated surface.

32. Hardness, UV transmissivity, chip resistance, scratch resistance, and adhesion relate to the durability of the coating.

33. Chips and scratches, when present on exposed surfaced, are visible and, therefore, affect the appearance of the vehicle.

34. Hiding relates both to appearance and to durability.

35. If untreated, chips are a likely location for the formation of rust.

36. If untreated, scratches are a likely location for the formation of rust.

37. The clear coat included UV absorbing chemicals which prevent or limit the transmission of UV to the prime layer.

38. Pigments in the color coat provide the desired color for the vehicle.

39. The presence of clear coat over the color and prime prevented degradation of the prime and color coats and extended their useful life.

40. The presence of the prime, color coat, and clear coat over the metal provided for an aesthetically pleasing appearance of the body of the vehicle and prevented corrosion in the metal and extended its useful life.

41. Color coat delamination is an undesirable condition in a painted vehicle.

42. Color coat delamination results from a loss of adhesion between the color coat and the underlying prime.

43. This loss of adhesion is the result of "chalking" at the prime surface.

44. Chalking results form the exposure of the prime surface to ultraviolet radiation.

It also appears undisputed that, except for painting and coating, the sheet metal components at issue exported from the United States for assembly into the imported trucks are entitled to duty exemption under HTSUS subheading 9202.00.80, as physically identifiable United States products ready for assembly, which are not otherwise advanced in value or improved in condition. Trial Transcript ("Tr.") at 6.

As the court also found at the conclusion of the trial in *Chrysler Corp.,* 19 CIT at 355, the court finds that the paint process as a whole is primarily for preservation. *See* Uncontested Facts 7 (steps a. through d. are admittedly preservative), 8, 23–44. Moreover, Dr. Norman R. Roobol, defendant's expert, a professor of industrial painting, testified that a fully painted vehicle would be expected to last up to fifteen (15) years without corrosion and a vehicle which was treated only through the prime layer would be expected to reveal corrosion within eighteen (18) to twenty-four (24) months. Tr. at 176–79. This is consistent with the testimony of Mr. Bjelica, *see* Tr. at 53, and that of plaintiff's expert, Dr. Clifford K. Schoff, an expert in automotive coatings. *See* Tr. at 112–13 (explaining that the primary purpose of the whole paint system is to preserve the vehicle).

It is also clear that prevention of corrosion of metal parts is what preservative painting is intended to do here. It does not matter whether the corrosion prevented would be unsightly or not, minor or structural. If the process is intended to and does prevent corrosion it is preservative, at least in part. Thus, the court rejects defendant's view that prevention of serious, perhaps only perforation, corrosion is what is meant by preservative. Defendant's argument that intermediate effects such as chipping, scratching, and delamination are irrelevant fails. Its view that because all or some of these conditions may be corrected, they do not cause corrosion, is untenable.[3] A manufacturer cannot assume that vehicle owners will perform detailed paint inspections for the first signs of deterioration. Vehicle finishes are expected to last for years without extraordinary intervention. *See* Tr. at 43.

On the other hand, the court rejects plaintiff's view that preservation of the paint layers themselves or preservation of aesthetic appearance alone is sufficient. The assembled parts at issue are metal parts. It is their preservation in an uncorroded state which is key. If the court were to consider the paint system as one operation, plaintiff would prevail because the paint system as a whole is intended to prevent corrosion of the metal parts, and thus 19 C.F.R. § 10.16(b)(3) would be satisfied. On this point, Dr. Schoff was clear and persuasive. The next issue, however, is whether for analytical purposes the court should subdivide the paint process and consider the last two coats, the base color coat and clear coat, separately. *See* Uncontested Fact 7 (steps e. and f.).

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[3] It is clear that these processes affect appearance. The link between delamination and corrosion was somewhat muddied, but the testimony combined with uncontested facts reveal that chips, scratches, and delamination are all linked to corrosion. *See* Tr. at 62–66, 87–92 and Uncontested Facts 32, 35–36, 42–44.

While there may be one paint process, it is composed of several operations. The regulation speaks in terms of "operations," which is consistent with the statutory language. Although it is not clear what constitutes a separate operation, a baking process separates the prime coat from the top coats, as the court noted in *Chrysler Corp.,* 19 CIT at 354, and *Daimler Chrysler,* Slip Op. No. 00–124 at 11.[4] This sufficiently separates the top coats from the remainder of the paint process, so that, at least, together they are a separate operation. Accordingly, if any such separate painting step is primarily for purposes other than preservation, it will disqualify the article from treatment under the tariff exemption.

The color and clear coats obviously provide some preservative feature, primarily because of the ultraviolet ("UV") protection provided by these top layers, which ultimately prevents degradation of the primer. *See* Tr. at 89–90, 102, 167, 170 and Uncontested Facts 37, 39–44. The primer both preserves the underlying metal and provides a good surface for top coat adhesion. *See* Tr. at 97–101; Defendant's Exhibit ("Def.'s Ex.") L (McBane treatise) at 12–13; Uncontested Facts 8, 28, 40, 42. Moreover, the top coats must meet paint engineering standards, regardless of their appearance. *See* Tr. at 41–43; Plaintiff's Exhibits ("Pl.'s Ex.") 11–15 (regarding weathering, engineering, and material standards); Uncontested Fact 19. All paint must work. It must be appliable, it must stick, it must hide sublayers or surfaces, it must last, and it must meet other norms. Tr. at 45–46, Pl.'s Ex. 13–15 and Uncontested Fact 23. This does not determine whether it is primarily decorative or preservative.

These paints, however, are highly engineered to give distinctive appearances to the vehicles. The UV protection afforded by the top coats is also intended to protect the paint itself. *See* Tr. at 90, 166–69. It is also clear that the industry considers these coats primarily decorative and not primarily preservative. *See* Tr. at 76–77 (Testimony of T. Bjelica); Def.'s Ex. G (Connolly Depo.) and Ex. 3 thereto (memorandum to Chrysler dealers at 1); Pl.'s Ex. 12.

A tremendous amount of effort goes into color decisions and some colors are extremely expensive. *See* Tr. at 14–28 (Testimony of M. Hackstedde) and Tr. at 160 (Testimony of N. Roobol (stating that some colors can cost in excess of $100/gallon). The pigments are much more finely ground than those for primer paint. Tr. at 159–60.

What the market requires is a choice of colors, very high gloss ("wet look"), and reflection, otherwise known as distinctness of image

[4] In connection with *Chrysler Corp.,* the court had the opportunity to view the entire assembly and painting process on site at DaimlerChrysler's Mexican plants. 19 CIT at 354 n.2. The parties are in agreement that the process the court observed and the one at issue here are essentially the same. Both parties originally asked the court to decide this case on the basis of the first trial.

("DOI").[5] *See* Def.'s Ex. G at Ex. 3; Tr. at 17–20, 25–27, 52; Uncontested Facts 29–31. Gloss and DOI relate solely to appearance. Uncontested Fact 31. Gloss and DOI are provided by the clear coat. Tr. at 165–66. Although the clear coat does provide some protection to underlying layers, it is not necessary to a full preservative system. *See* Tr. at 103, 164–167; Def.'s Ex. L at 32–33.[6]

Further, corrosion may be prevented by using different kinds of primers, different coatings on the steel, or different materials for the sheet metal components. *See* Tr. at 184–85. Finally, the court finds it significant that Dr. Schoff, plaintiff's precise and authoritative expert, never clearly stated that the top coats were primarily intended to be preservative, or even equally preservative and appearance enhancing.[7] The court perceived from the structure of the testimony and the demeanor of the witness that Dr. Schoff's testimony was tailored to avoid such conclusions and that no "expert" would opine that the top coats were essentially "preservative." Given the metals and primer chosen, these top coats must provide some preservation functions, but they are the way they are primarily for appearance reasons.

CONCLUSIONS OF LAW

The general legal framework is fully set forth in the court's earlier opinion in this matter. *See Daimler Chrysler Corp.,* Slip Op. No. 00–124. As the court has found as a matter of fact that the top coat operations are designed primarily to enhance the appearance of the vehicle and to impart to it distinctive features or characteristics, such as color, gloss, and DOI, the duty exemption at issue does not apply. *See* HTSUS subheading 9802.00.80; 19 C.F.R. 10.16(c)(3). Furthermore, the DaimlerChrysler employee witnesses and documents made it quite clear that the top coats are not commonly viewed as "preservative" paints or coatings. They are known as decorative coats, distinguishing them from preservative coatings.

The court does not ignore plaintiff's argument that Congress intended an easily administrable bright line test, and painting is painting is painting. This is a superficially appealing argument, and it is the one adopted by the dissent in *General Motors Corp.,* 976 F.2d at 722–23, but the court concludes that there is no bright line and what is "painting" incidental to assembly is not always easily determined. For example, there seems to be agreement that a replica of the Sistine Chapel ceiling on the hood of a vehicle, though "painting," is not what was meant by

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[5] Dr. Roobol's testimony on this point, which plaintiff requests be stricken as beyond his expertise, is merely cumulative. Furthermore, the court found both experts well-qualified, even in collateral areas such as this, and finds them both credible. In fact, all of the witnesses were knowledgeable and remarkably candid. It is the inferences that one draws from the testimony that differ.

[6] There was agreement among the experts that the type of primer used on the truck box was more susceptible to UV degradation and that the UV absorber in the clear coat was not as important for preservation of the more stable primer used on the other parts of the truck body. Tr. at 96–100, 170–71.

[7] Because 19 C.F.R. § 10.16(b)(3) does not say use the word "primarily" in describing preservative paint and § 10.16(c)(3) refers to "primarily" appearance enhancing painting, plaintiff argues that paint with two equal functions would qualify for the exemption. The court does not read the regulation that way. Preservative painting is not expressly qualified in § 10.16(b)(3), but the structure of the regulation suggests that a paint must be primarily preservative to satisfy the regulation. This potential ambiguity need not be resolved definitively as plaintiff did not prove equal functionality.

Congress as an operation incidental to assembly, or what was meant by the regulation drafters. Less facetiously, plaintiff itself attached to its brief a representation of a vehicle with flame decorations as an example of excluded painting. Suppose the painting is not of flames but the vehicle is painted in two tones or three tones? Perhaps one could establish a standard that any painting that takes an assembled article out of the norm for that article is disqualifying. That of course, is not a bright line test. One would still debate the parameters of the norm.

After two trials and review of numerous exhibits, the court does not find this an easy classification decision. The top coat painting at issue is clearly a part of a broader painting process and a part of the assembly process as well, and part of its function is to preserve the underlying preservative layers and the metal substrate. Moreover, there seems to be little purpose to disqualifying the parts from duty exemption under the pre-NAFTA scheme applicable to the vehicle. It certainly would not have helped to encourage use of United States made parts, which appears to be a purpose of the statute. Nonetheless, Congress may draft the exemption for U.S. parts assembled abroad as narrowly as it wishes and the court is bound to apply the law, which includes the regulation and the extant teachings of the Federal Circuit on this matter. As the top coats are primarily intended to enhance the appearance of the trucks, the duty exemption does not apply.

Because the preservative versus appearance-enhancing distinction is so difficult to draw in this case, the court alternatively determines that if the court could not apply either 19 C.F.R. § 10.16(b)(3) or (c)(3), and if it were called upon to decide if the top coat operations were other than "minor," *see General Motors Corp.,* 976 F. 2d at 719, or whether they "impart[ed] significant new characteristics or qualities" to the vehicles for purposes of 19 C.F.R. § 10.16(c)(5), it would so conclude based upon the facts found. All of the evidence demonstrates that the top-coating processes are highly engineered, expensive, and primarily intended to make the vehicles eye-catching. Color, gloss, and DOI are distinctive. Plaintiff's view that "distinctiveness" must take the vehicles out of the norm for the product has no basis.

Judgment shall enter accordingly.

APPENDIX

Harmonized Tariff Schedule of the United States (19 U.S.C. § 1202)

Subheading	*Description*
9802.00.80	Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting. * * *

19 C.F.R. § 10.16 Assembly abroad.

(a) *Assembly operations.* The assembly operations performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners, and may be preceded, accompanied, or followed by operations incidental to the assembly as illustrated in paragraph (b) of this section. The mixing or combining of liquids, gases, chemicals, food ingredients, and amorphous solids with each other or with solid components is not regarded as an assembly.

(b) *Operations incidental to the assembly process.* Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:

(1) Cleaning;

(2) Removal of rust, grease, paint, or other preservative coating;

(3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation;

(4) Trimming, filing, or cutting off of small amounts of excess materials;

(5) Adjustments in the shape or form of a component to the extent required by the assembly being performed abroad;

(6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips; and

(7) Final calibration, testing, marking, sorting, pressing, and folding of assembled articles.

(c) *Operations not incidental to the assembly process.* Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not re-

lated to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):

(1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;

(2) Cutting of garment parts according to pattern from exported material;

(3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as shower-proofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

(d) *Joining of American-made and foreign-made components.* An assembly operation may involve the use of American-made components and foreign-made components. The various requirements for establishing entitlement to the exemption apply only to the American-made components of the assembly.

(e) *Subassembly.* As assembly operation may involve the joining or fitting of American-made components into a part or subassembly of an article, followed by the installation of the part or subassembly into the complete article.

(f) *Packing.* The packing abroad of merchandise into containers does not in itself qualify either the containers or their contents for the exemption. However, assembled articles which otherwise qualify for the exemption and which are packaged abroad following their assembly will not be disqualified from the exemption by reason of their having been so packaged, whether for retail sale or for bulk shipment. The tariff status of the packing materials or containers will be determined in accordance with General Rule of Interpretation 5, HTSUS (19 U.S.C. 1202).

(Examples omitted and emphasis added.)

(Slip Op. 02–131)

FORMER EMPLOYEES OF CHEVRON PRODUCTS CO., PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 00–08–00409

[Plaintiffs' motion for judgment on the agency record granted in part, and action remanded to Defendant for further proceedings consistent with opinion.]

(Decided October 28, 2002)

Meeks & Sheppard, (Ralph H. Sheppard and *Diane L. Weinberg),* for Plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, and *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Henry R. Felix); Louisa Reynolds,* Office of the Solicitor, U.S. Department of Labor, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* In this action, Plaintiffs—former employees of the Roosevelt Terminal division of Chevron Products Company ("the Roosevelt Workers")—contest both the denial of their petition for adjustment assistance benefits under the North American Free Trade Agreement ("NAFTA") Implementation Act and the determination of the U.S. Department of Labor ("Labor Department") declining to reconsider its denial of that petition, as well as the agency's separate determination denying them benefits as secondarily-affected workers under the Statement of Administrative Action accompanying the NAFTA Implementation Act.

Pending before the Court is Plaintiffs' Motion for Judgment on the Agency Record, which seeks "an order reversing [the Labor Department's] determinations and awarding adjustment assistance" or, in the alternative, a remand to the Department for further investigation. *See* Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record ("Plaintiffs' Brief") at 2, 8, 12–13; Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Plaintiffs' Reply Brief") at 4, 5. The Government opposes Plaintiffs' motion and urges that the Labor Department's determinations be sustained as supported by substantial evidence in the record and otherwise in accordance with law. *See* Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Brief") at 1, 11, 29.

Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (1994). For the reasons set forth below, the administrative record in this matter is inadequate to support a determination on the Roosevelt Workers' eligibility for NAFTA-TAA benefits. Plaintiffs' Motion for Judgment on the Agency Record is therefore granted in part, and the action is remanded to Defendant for further proceedings consistent with this opinion.

I. BACKGROUND

A. THE TRADE ADJUSTMENT ASSISTANCE LAWS

As the court noted in *Int'l Union v. Marshall:*

> The Trade Act of 1974 was intended "to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade," while, at the same time, providing "adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and *to assist industries, firm[s], workers, and communities to adjust to changes in international trade flows."*

Int'l Union v. Marshall, 584 F.2d 390, 391 (D.C. Cir. 1978) (emphasis added) (*quoting* 19 U.S.C. § 2102(1), (4) (1976)). The court explained the purpose of the Trade Adjustment Assistance ("TAA") Program established by the 1974 Act:

> Congress was of the view that fairness demanded some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular industries and workers who suffer a loss much as the doctrine of eminent domain requires compensation when private property is taken for public use. Otherwise the costs of a federal policy that conferred benefits on the nation as a whole would be imposed on a minority of American workers and industries.

Id. at 395 (citations omitted). Under the TAA program, displaced workers are eligible for a variety of trade adjustment assistance benefits, designed to "encourage workers who are unemployed because of import competition to learn the new skills necessary to find productive employment in a changing American economy." S. Rep. No. 100–71, at 11 (1987).

Similarly, Congress and the Administration recognized that—while NAFTA would "result in net economic benefits and increased job opportunities" for workers in the United States—"some workers [would] have to find new employment." *See* Statement of Administrative Action Accompanying NAFTA Implementation Act ("Statement of Administrative Action"), H.R. Doc. No. 103–159, vol. 1 at 672 (1993). Drawing on "the best aspects of existing programs," the NAFTA Transitional Adjustment Assistance ("NAFTA-TAA") Program[1] established under the NAFTA Implementation Act was deemed "essential" to "provide affected workers with both rapid and early intervention and the ability to engage in long term training while receiving income support." *Id*. Much like trade adjustment assistance available under the Trade Act of 1974, the NAFTA-TAA program entitles certain workers whose job losses are attributable to increased import competition from (or shifts in production to) Canada or Mexico to receive benefits including employment ser-

[1] Benefits available under the program established by the Trade Act of 1974 are denominated "*trade* adjustment assistance," while those available under the NAFTA Implementation Act are referred to as "*transitional* adjustment assistance." Both programs are generally referred to herein as "trade adjustment assistance," except where specifically indicated.

vices, appropriate training, job search and relocation allowances, and income support payments. *See id.* at 673–74; 19 U.S.C. § 2331(d) (1994).

To qualify for NAFTA-TAA benefits, a group of workers or their union or other authorized representative must file with their Governor (generally through appropriate state labor authorities) a petition for certification of eligibility to apply for adjustment assistance. After 10 days, the state forwards its preliminary findings and recommendation to the Labor Department, which conducts an investigation and reaches a final determination on the petition. 19 U.S.C. § 2331(b)–(c) (1994).

The trade adjustment assistance statutes are remedial legislation and, as such, are to be construed broadly to effectuate their intended purpose. *Woodrum v. Donovan,* 5 CIT 191, 198, 564 F. Supp. 826, 832 (1983) (*citing United Shoe Workers of Am. v. Bedell,* 506 F.2d 174, 187 (D.C. Cir. 1974)), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984); *see also Former Employees of Champion Aviation Prods. v. Herman,* 23 CIT 349, 352 (1999) (citations omitted) (NAFTA-TAA statute is remedial legislation, to be construed broadly). Moreover, both "because of the *ex parte* nature of the certification process, and the remedial purpose of [the statutes], the [Labor Department] is obliged to conduct [its] investigation with the utmost regard for the interests of the petitioning workers." *Stidham v. U.S. Dep't of Labor,* 11 CIT 548, 551, 669 F. Supp. 432, 435 (*citing Abbott v. Donovan,* 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (quotations omitted) *("Abbott II")).*

Thus, while the Labor Department is vested with considerable discretion in the conduct of its investigation of trade adjustment assistance claims, "there exists a threshold requirement of reasonable inquiry. Investigations that fall below this threshold cannot constitute substantial evidence upon which a determination can be affirmed." *Former Employees of Hawkins Oil and Gas, Inc. v. U.S. Sec'y of Labor,* 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993).[2]

B. The Facts of This Case

The Labor Department's denial of the Roosevelt Workers' petition for NAFTA-TAA benefits—the action at issue here—has its roots in the Department's denial of the Roosevelt Workers' earlier petition for assistance under the Trade Act of 1974. Upon receipt of that petition ("the TAA petition"), the Labor Department initiated an investigation, and sent Chevron Products Company ("CPDS") a standard form TAA "Busi-

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[2] *See, e.g., Hawkins Oil and Gas,* 17 CIT at 130, 814 F. Supp. at 1115 (castigating agency for "a sloppy and inadequate investigation" which was "the product of laziness," and holding that a fourth remand would be "futile"); *Local 116, Int'l Union of Electronic, Electrical, Salaried, Machine and Furniture Workers v. U.S. Sec'y of Labor,* 16 CIT 490, 493–94, 793 F. Supp. 1094, 1096–97 (1992) (criticizing agency efforts as "cursory at best," and finding that "there was actually no investigation done whatsoever"); *Former Employees of Alcatel Telecomms. Cable v. Herman*, 24 CIT ___, ___, No. 98–03–00540, Slip Op. 00–88, 2000 Ct. Intl. Trade LEXIS 90, at *24–26 (2000) (concluding that "the administrative record reveal[ed] no more than an inadequate investigation lacking detail" where, *inter alia*, agency based its negative determination on responses to wrong type of questionnaire and failed to verify accuracy of company's questionnaire responses); *Former Employees of Swiss Indus. Abrasives v. United States,* 17 CIT 945, 949–50, 830 F. Supp. 637, 641–42 (1993) *("Swiss Indus. Abrasives I")* (characterizing agency's actions as "unreasonable" and its investigation as "misguided and inadequate at best" where agency, *inter alia*, failed to clarify important aspects of information provided by company, relied on company's unsubstantiated statements on critical point, and ignored other relevant information).

ness Confidential Data Request" questionnaire. *See* AR 11.[3] CPDS's Human Resources Manager—Irene D. Aviani—responded to the questionnaire, describing the Roosevelt Workers, in essence, as truck drivers, and providing certain other information concerning (1) the company's organizational structure; (2) the company's sales, production and employment; (3) company imports and layoffs; (4) any transfers of production; and (5) the company's major declining customers. *See* CAR 13–15.

Based on its investigation, the Labor Department denied the Roosevelt Workers' petition for TAA, finding that they were engaged in the performance of services and, thus, did not produce an article within the meaning of the TAA statute. AR 16 (Notice of Negative Determination Regarding Eligibility To Apply For Worker Adjustment Assistance (Feb. 17, 2000)). The Labor Department further found that the reduction in demand for the workers' services did not originate at a production facility whose workers independently met the statutory criteria for certification. AR 16–17.

Seeking to appeal the Labor Department's denial of their TAA petition, the Roosevelt Workers sought the assistance of representatives of the State of Utah's Department of Workforce Services. AR 4. In the process of preparing the appeal, the Utah officials learned for the first time "that Chevron had been buying Canadian oil." AR 4. In light of the Canadian imports, a new petition was filed—this time seeking NAFTA-TAA benefits. AR 1–5 (Petition for NAFTA Transitional Adjustment Assistance, with attachments). It is that NAFTA-TAA petition which is at issue here.

According to the NAFTA-TAA petition, before they were laid off, the Roosevelt Workers were employed as "gaugers," who went to "well head[s] and or crude oil tanks" to perform various tasks to determine whether crude oil should be purchased—"[c]hecking temperature, gaug[ing] the amount of crude in the tank, tak[ing] samples for gravity test and grind out for BS&W, and check[ing] the bottom of the tank for water or impurities." AR 3. The NAFTA-TAA petition further explained that, if the samples were satisfactory and all tests were passed, "a crude oil run ticket [was] written up" and "drivers [were] dispatched to the location * * * [to] load[ ] the crude oil on [their] truck[s] and transport[ ] it to one of three locations for refining." AR 3.

According to the NAFTA-TAA petition, an influx of lower-cost crude oil imported from Canada by Chevron and other companies led to dramatic cutbacks in domestic production. Those cutbacks in domestic production, in turn, resulted in a reduced demand for gaugers such as the Roosevelt Workers and—eventually—in the termination of their employment. AR 3.

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[3] Because the administrative record in this action includes confidential information, two versions of that record were prepared. Citations to the public administrative record are noted as "AR ___," while citations to the confidential version are noted as "CAR ___." The sole difference between the two is that pages 13 through 15—the "Business Confidential Data Request" questionnaire completed by CPDS's Human Resources Manager—are omitted from the public version, because they include business confidential information.

Finally, the NAFTA-TAA petition stated that the Roosevelt Workers' former employer "suppl[ied] components/unfinished and semifinished goods" (specifically, crude oil) to "Chevron USA," which then refined the crude into petroleum products. The Roosevelt Workers therefore claimed that they qualified for trade adjustment assistance as secondarily-affected workers, pursuant to the Statement of Administrative Action accompanying the NAFTA Implementation Act. AR 2.

Accompanying the NAFTA-TAA petition was an internal memorandum prepared by a representative of the State of Utah's Workforce Services Department, chronicling certain events leading up to the filing of that petition and documenting a significant "lack of cooperation from Chevron." AR 4. The memo noted that Chevron was "very hostile" to the Workforce Services Department representative who contacted the company concerning the Roosevelt Workers' TAA petition, stating that "it was none of her business." AR 4. The memo further noted that one Chevron official who had provided the Roosevelt Workers with much information "did not want them to use his name as he [was] worried about the negative effects from Chevron." AR 4.

The preliminary Findings and Recommendations of the State of Utah—including a finding that "[t]he Chevron company is receiving all crude products from Canada, causing the company in Roosevelt, Utah to layoff workers"—also were forwarded to the Labor Department. *See* Memorandum from State of Utah Department of Workforce Services to U.S. Department of Labor re: NAFTA-TAA Petition Preliminary State Investigation/Chevron (CPDS) (April 10, 2000) (Plaintiffs' Brief, Exh. 3). However, there is no indication that the Labor Department considered Utah's findings in reaching its determination. *See* Defendant's Brief at 27 (conceding that "it is unclear from the record whether the agency decisionmaker considered the preliminary findings prior to issuing his decision").

Relying exclusively on its earlier investigation, the Labor Department denied the Roosevelt Workers' NAFTA-TAA petition. With no further investigation, the agency again ruled that the workers "were engaged in lifting and transportation of crude oil to domestic refineries" and thus "were engaged in services and did not produce an article" within the meaning of the statute; nor did the "reduction in [the] demand for [their] services * * * originate at a production facility whose workers independently [met] the statutory criteria for certification." AR 10 (Findings of the [NAFTA-TAA] Investigation); AR 18–19 (Notice of Negative Determination Regarding Eligibility To Apply for NAFTA-Transitional Adjustment Assistance (April 24, 2000)).[4] Notice of that negative determination was published May 11, 2000. AR 24 (Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, 65 Fed. Reg. 30,442, 30,444 (May 11, 2000)).

[4] Notices of the Labor Department's denial of the NAFTA-TAA petition were sent to the Roosevelt Workers the day after the determination. AR 20–23.

The Roosevelt Workers filed a timely application for administrative reconsideration of the denial of their NAFTA-TAA petition. *See* AR 29.[5] The application for reconsideration stated, in essence, that (1) the relatively low price of crude oil imported from Canada forced U.S. producers to reduce domestic activity, which resulted in a loss of demand by domestic oil producers for gaugers, leading to the Roosevelt Workers' separation; (2) an increase in imports of Canadian crude oil, including imports by Chevron, replaced lost production in the local area; (3) Chevron's replacement of locally-produced domestic oil with lower cost Canadian crude caused a reduced demand for the Roosevelt Workers' services; (4) other trucking and non-producing entities have been certified for trade adjustment assistance; (5) the Labor Department's determination was premature because the State of Utah had not issued its preliminary findings of investigation; and (6) the Labor Department official issuing denials of petitions in the first instance should not also be responsible for the review of administrative appeals of those denials. AR 29–30; *see also* AR 33–34.

In response to the application for reconsideration, a Labor Department investigator phoned Ms. Aviani, the Human Resources Manager of Chevron Products Company ("CPDS"), sometime in May 2000, to ask about "the type of work being performed by the[ ] workers at the Roosevelt Utah facility." *See* AR 31 (Memorandum to File (undated), from Rick Praeger (Labor Department), re: "TA-W–37,240: Chevron Products Company, Roosevelt, Ut"). Ms. Aviani told the investigator that "the workers drove trucks and would pick up or deliver crude." AR 31. When the investigator asked whether the drivers did pick ups and deliveries only for Chevron wells, Ms. Aviani initially stated that the wells were "either Chevron owned or 'partner' wells." AR 31. However, some time later, she called the investigator back to retract her earlier statement, and reported instead that "95% of the crude picked up by the drivers in Roosevelt * * * [was] from 3rd party wells in which Chevron did not have a financial interest, other than purchasing the crude." AR 31.

On July 21, 2000, the Labor Department denied the application for reconsideration, stating that—according to its investigation—"there were no company imports of crude oil" but, rather, the Roosevelt Workers were "engaged in lifting and transporting crude oil," and thus provided a service and did not produce an article within the meaning of the statute. AR 32–35 (Notice of Negative Determination Regarding Application for Reconsideration (July 25, 2000)). The Labor Department further ruled that the Roosevelt Workers did not satisfy the criteria applicable to service workers because (1) "[t]here were no NAFTA-TAA certifications in effect for workers of Chevron Products Company," and (2) the Roosevelt Workers "lifted and transported crude oil that was pri-

[5] In the same submission, the Roosevelt Workers also sought reconsideration of the Labor Department's denial of two TAA petitions. *See* AR 29. The Labor Department denied those aspects of the application for reconsideration on procedural grounds, and those denials are not challenged in this action. *See* AR 32.

marily purchased from unaffiliated firms."[6] *Id*. The Labor Department rejected the Roosevelt Workers' remaining contentions as well and, accordingly, sustained its original determination denying their eligibility for NAFTA-TAA. AR 35. Notice of the denial of reconsideration was published on August 1, 2000. AR 43 (Notice of Negative Determination Regarding Application for Reconsideration; Chevron Products Company, Roosevelt, UT, 65 Fed. Reg. 46,988 (Aug. 1, 2000)).

At the same time it denied reconsideration of its determination on the NAFTA-TAA petition, the Labor Department also issued a determination denying the Roosevelt Workers certification as a "secondarily-affected worker group" under the Statement of Administrative Action accompanying the NAFTA Implementation Act. AR 36 (Negative Finding Regarding Qualification as a Secondarily Affected Worker Group Pursuant to the Statement of Administrative Action Accompanying the NAFTA Implementation Act (July 21, 2000)). That negative determination was based on the agency's findings that (1) "[t]he workers of Chevron Products Company in Roosevelt, Utah, are engaged in * * * employment related to lifting and transporting crude oil"; (2) "the majority of [the] crude oil lifted and transported by the Roosevelt workers [was] purchased from 3rd parties"; and (3) the workers did not "supply components, unfinished, or semifinished goods to a directly-affected ('primary') firm nor did they assemble or finish products made by a directly-affected firm." AR 37.

This appeal followed.

II. Standard of Review

Judicial review of a Labor Department determination denying certification of eligibility for trade assistance benefits is confined to the administrative record. *See*, *e.g.*, *Champion Aviation,* 23 CIT at 350 (*citing* 28 U.S.C. § 2640(c) (1994) *and Int'l Union v. Reich,* 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998)). The agency's determination must be sustained if it is supported by substantial evidence in the record and is otherwise in accordance with law. 19 U.S.C. § 2395(b) (1994); *Swiss Indus. Abrasives I,* 17 CIT at 947, 830 F. Supp. at 639 (*citing Former Employees of Gen. Elec. Corp. v. U.S. Dep't of Labor,* 14 CIT 608, 611 (1990)).

The Labor Department's findings of fact are thus conclusive if they are supported by substantial evidence. *See Former Employees of Galey & Lord Indus., Inc. v. Chao,* 26 CIT ____, ____, No. 01–00130, Slip Op. 02–74, 2002 Ct. Intl. Trade LEXIS 79, at *6 (2002) (citation omitted). However, substantial evidence is more than a "mere scintilla"; it must be enough to reasonably support a conclusion. *Id.* at *7 (*citing Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (1987)). And "[a]n assessment of the substantiality of record evidence must take into account whatever else in the record fairly detracts from its weight." *Former Employees of*

[6] Notices of the Labor Department's denial of the application for reconsideration were sent to the Roosevelt Workers the same day. AR 39–42.

Swiss Indus. Abrasives v. United States, 19 CIT 649, 651 (1995) (*citing Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951)) *("Swiss Indus. Abrasives II").*

Moreover, all rulings based on the agency's findings of fact must be "in accordance with the statute and not * * * arbitrary and capricious"; to that end, "the law requires a showing of reasoned analysis." *Gen. Elec. Corp.,* 14 CIT at 611 (*quoting Int'l Union v. Marshall,* 584 F.2d at 396 n.26).

In short, although it is clear that the scope of review here is narrow, and that a court is not free to substitute its judgment for that of the agency, it is equally clear that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Alcatel Telecomms.,* 24 CIT at ____, ____, No. 98–03–00540, Slip Op. 00–88, 2000 Ct. Intl. Trade LEXIS 90, at *11 (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.,* 463 U.S. 29, 43 (1983) (citations omitted)). Where "good cause [is] shown," a case must be remanded for further investigation and analysis. *See* 19 U.S.C. § 2395(b) (1994); *Former Employees of Linden Apparel Corp. v. United States,* 13 CIT 467, 469, 715 F. Supp. 378, 381 (1989); *Swiss Indus. Abrasives I,* 17 CIT at 947, 830 F. Supp. at 640.

III. Analysis

As part of the NAFTA Implementation Act, lawmakers established a trade adjustment assistance program with two separate components, designed to provide benefits both for workers in firms "directly affected by imports from or shifts in production to Mexico or Canada" and for "workers in secondary firms that supply or assemble products produced by firms that are directly affected." Statement of Administrative Action, H.R. Doc. No. 103–159, vol. 1 at 672, 674 (1993). The Roosevelt Workers petitioned for certification under both components of the program, which are addressed in turn below.

A. Eligibility for Assistance to Workers in Directly Affected ("Primary") Firms

Under the NAFTA-TAA statute, as well as the TAA provisions of the Trade Act of 1974, workers in directly affected ("primary") firms may be eligible for assistance either as "production workers" or as "support service workers."

1. Eligibility as "Production Workers"

Under the NAFTA-TAA statute, workers are to be certified as eligible for benefits if the Secretary of Labor determines 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, or are threatened to become totally or partially separated, and either—

> (A) that—
>
> (i) the sales or production, or both, of such firm or subdivision have decreased absolutely,
>
> (ii) imports from Mexico or Canada of articles like or directly competitive with *articles produced* by such firm or subdivision have increased, and
>
> (iii) the increase in imports under clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or
>
> (B) that there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly competitive with articles which are produced by the firm or subdivision.

19 U.S.C. § 2331(a)(1) (1994) (emphasis added). Thus, on its face, the NAFTA-TAA statute covers displaced workers who *produced articles*.

The Labor Department denied the Roosevelt Workers' NAFTA-TAA petition based on its conclusion that the workers did not produce an article but were, rather, "engaged in services." AR 18, 27, 33–34. The agency apparently based that conclusion on its finding that "[t]he affected workers were engaged in the lifting and transportation of crude oil." AR 18. *See also* AR 10, 33–34. However, as it stands, the record supports neither the Labor Department's finding as to the nature of the work performed by the Roosevelt Workers, nor its conclusion that they provided services and did not "produce" an "article."

Although rendered in a TAA case, the recent opinion in *Marathon Ashland* is instructive here. *Former Employees of Marathon Ashland Pipeline, LLC v. Chao,* 26 CIT ____, 215 F. Supp. 2d 1345 (2002). Much like this case, that case also involved workers formerly employed as "gaugers" who assertedly "performed the functions, *inter alia*, of testing and determining the quality of crude oil to be purchased and transported." 26 CIT at ____, 215 F. Supp. 2d at 1347.[7] There, too, the Labor Department denied the workers' petition based on its conclusion that the gaugers provided services and did not produce an article. 26 CIT at ____, 215 F. Supp. 2d at 1349.

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[7] Plaintiffs' Reply Brief noted that "the court has not previously addressed whether the act of gauging oil is an activity contemplated by the statute." *See* Plaintiffs' Reply Brief at 2–3. Although that statement was true at the time it was made, neither party brought *Marathon Ashland* to the attention of the Court after that opinion issued. *See generally* Thomas R. Newman & Steven J. Ahmuty, Jr., *Disclosing Adverse Authority,* N.Y. L.J., Sept. 4, 2002, at 3 (discussing "the lawyers' responsibility to see to it that all relevant authorities are brought to the attention of the court, those supporting the position urged as well as those against it," and noting that—"just as one would advise the court of a recently decided, or found, favorable case," in fulfillment of counsel's duty to zealously represent the interests of his client—so too the ethical obligation of candor toward the court requires that counsel "disclose directly adverse authority not known to and cited by opposing counsel."). *See also* ABA Model Rules of Prof'l Conduct R. 3.3 (2002), "Candor Toward the Tribunal."

Counsels' duties of disclosure "continue to the conclusion of [a] proceeding" and cover any legal authority "in the controlling jurisdiction" (including not only decisions of relevant appellate courts, but also decisions of the same court, courts of coordinate jurisdiction and even lower courts). *See, e.g.,* ABA Model Rules of Prof'l Conduct R. 3.3(c) (duration of obligation to disclose); *Disclosing Adverse Authority,* N.Y. L.J., Sept. 4, 2002, at 4 (definition of "controlling jurisdiction"); Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority,* 43 Clev. St. L. Rev. 303, 308 (1995) (Rule 3.3 "dictates disclosure of cases decided by the same court or higher courts in the same jurisdiction"). *See also Amoco Oil Co. v. United States,* 234 F.3d 1374, 1378 (Fed. Cir. 2000) (criticizing counsel's "fail[ure] to cite, much less distinguish, clearly governing case law" as potential violation of Rule 3.3).

But the *Marathon Ashland* court held that the Labor Department's negative determination was not supported by substantial evidence, because the agency drew "the unsubstantiated conclusion that the petitioning employees did not 'produce' an article" within the meaning of the statute. 26 CIT at _____, 215 F. Supp. 2d at 1351. Criticizing the Labor Department for relying on "conclusory assertions provided by company officials" while ignoring "evidence presented by the petitioning workers * * * that they were involved in more than the mere transportation of crude oil, [that] directly contradicts the company officials' conclusions," the court emphasized that "[a]t best, the administrative record provides limited information discussing whether the Plaintiffs' duties as gaugers place them within the group of eligible import-impacted employees Congress intended to benefit from TAA." 26 CIT at ____, 215 F. Supp. 2d at 1351–53. The *Marathon Ashland* court concluded that "[w]hether [the gaugers in that case] provided a service and did not participate in the 'production' of an 'article' * * * is a determination that the Secretary [of Labor] must make based on evidence in the record by discussing the duties performed by the gaugers and how their responsibilities fit into the oil production scheme of their parent company." 26 CIT at ____, 215 F. Supp. 2d at 1353. The court therefore remanded the case to the Labor Department for further investigation and analysis. 26 CIT at ____, 215 F. Supp. 2d at 1355.

The administrative record in this case is at least as skimpy as that in *Marathon Ashland,* and warrants the same result.

As in *Marathon Ashland,* the Roosevelt Workers were employed as "gaugers," and state that they performed "a number of tasks" at well heads and crude oil tanks before the oil was purchased and readied for transport: "[c]hecking temperature, gaug[ing] the amount of crude in the tank, tak[ing] samples for gravity test[ing] and grind[ing] out for BS&W, and check[ing] the bottom of the tank for water or impurities." AR 3. *See also* AR 29 (Roosevelt Workers required "to run tests for temperature, gauge volume of crude, percentage of BS and W, volume of water separation, and sediment in the bottom of the tanks"). Indeed, according to the Roosevelt Workers' petition, if the oil passed all tests administered by the gauger, "a crude oil ticket [was] written up for that tank * * * The drivers [were then] dispatched to the location and load[ed] the crude oil on [their] truck[s] and transport[ed] it to one of three locations for refining." AR 3. On its face, the clear implication of that language from the petition is that "gaugers" are personnel separate and distinct from "drivers," who are summoned only after the gaugers have tested and approved the oil. *See also* Plaintiffs' Brief at 8 (asserting that, as gaugers, Roosevelt Workers were "directly involved in the production process for petroleum * * * *before the drivers arrive[d]* * * * to transport the oil for refining") (emphasis added).

Nevertheless, for reasons not explained in the record, the Labor Department rejected the Roosevelt Workers' descriptions of the duties of their jobs, crediting instead a company official's representations that

"the workers drove trucks and would pick up or deliver crude." AR 31; *see also* CAR 13.

As the Government observes, the Labor Department may properly rely upon "unverified statements of company officials," absent "contradictory information." *See* Defendant's Brief at 26 (*citing U.S. Steel Workers of America, Local 1082 v. McLaughlin,* 15 CIT 121, 122 (1991) *and Local 167, Int'l Molders & Allied Workers' Union v. Marshall,* 643 F.2d 26, 31–32 (1st Cir. 1981)). But that is not the case here. As in *Marathon Ashland,* the unverified statements of the company official in this case were contradicted by the workers' descriptions of their own jobs.

Indeed, the doubt cast on the reliability of the information supplied by the company here is even greater than the doubt in *Marathon Ashland,* for two reasons. Not only was the information supplied by the company official in this case contradicted by that provided by the workers; in addition, the Labor Department was on notice that the company had earlier refused to cooperate with Utah state officials who were reviewing the Roosevelt Workers' petition. *See* AR 4 (documenting company's "lack of cooperation" with state official, and noting that company was "very hostile" to state official and "informed her that it was none of her business"). In fact, according to one Utah state official, the company actually gave the state *misinformation* on a critical point. *See* AR 4 (documenting company statement that workers were "taking early retirement which was not the case at all," and that one of those laid off "was only 24 years old").[8] Moreover, as discussed further below, the company official contacted by the Labor Department gave two inconsistent statements on a key point—the ownership of the oil wells where the Roosevelt Workers worked. *See* AR 31 (Aviani initially stated that wells were "either Chevron owned or 'partner' wells," but called back later to state that "95% of the crude * * * [was] from 3rd party wells").

As in *Marathon Ashland,* the inconsistency between the statements of the Roosevelt Workers and statements of the company official alone would have necessitated further agency investigation of the precise nature of the gaugers' work. But, in light of the Utah state officials' experience with the company, and the company official's changing story, the Labor Department should have seen "red flags" everywhere. "The less the [Labor Department] goes beyond the unsubstantiated oral statements of company officials, the less is required of plaintiffs to rebut those statements." *Former Employees of Bell Helicopter Textron v. United States,* 18 CIT 323, 328 (1994). Under the circumstances of this case, it was unreasonable for the Labor Department to rely on the un-

[8] The observations of the Utah state officials are difficult to reconcile with the Government's apparent confidence in claiming here that "[t]here is no evidence that Chevron Products Company officials were uncooperative or less than forthright during Labor's investigation." *See* Defendant's Brief at 26 n.10.

verified statements of CPDS's Human Resources Manager, Ms. Aviani, without further inquiry or explanation.[9]

The Roosevelt Workers' employment in the oil industry adds another dimension to the case. Apparently anticipating an argument that, as gaugers, the Roosevelt Workers were engaged in "exploration or drilling for oil" rather than production processes further downstream,[10] the Government notes that—prior to certain 1988 amendments to the TAA statute—workers involved in exploration or drilling were not considered to be "producing" an article for purposes of eligibility for TAA benefits. *See* Defendant's Brief at 20 n.8 (*citing Former Employees of Zapata Offshore Co. v. United States,* 11 CIT 841 (1987)).[11] Referring to 19 U.S.C. § 2272(b)(2) (1994) (which was added to the TAA statute in 1988 to clarify that exploration and drilling are included within the definition of "producing" oil), the Government emphasizes that "[a] similar definition was not included in the NAFTA Transitional Adjustment Assistance Program." Defendant's Brief at 20.

Although the Government does not amplify that argument, it is worth noting that the Labor Department's determinations in this case were not based on any such ground. AR 18–19, 32–35. Moreover, this appears to be an issue of first impression; and matters of statutory interpretation properly rest in the first instance with the agency charged with implementing the statute. Post hoc rationalization by litigation counsel is no substitute for the agency's own "reasoned analysis evident in the administrative record," which is what the law requires. *See generally SKF USA Inc. v. United States,* 254 F.3d 1022, 1028 (Fed. Cir. 2001) (*citing Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 165–69 (1962)); *Int'l Union v. Marshall,* 584 F.2d at 396 (footnote omitted).

Certainly the Government's brief identified nothing in the legislative history to suggest that the concept of "producing" an "article" was intended to be defined more narrowly for purposes of the NAFTA-TAA

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[9] *See, e.g., Bell Helicopter,* 18 CIT at 326 (Labor Department erred in relying on unverified statements of company officials where both officials "had serious adverse interests to acknowledging or confirming that the job losses were due to the fact that [the firm] could pay Canadians less than Americans * * * [and] * * * intended to do just that. The public relations implications alone were enough to cast a cloak of suspicion over [the firm's] responses, both in terms of veracity and completeness."); *Former Employees of Barry Callebaut v. Herman,* 25 CIT ____, ____, 177 F. Supp. 2d 1304, 1309–11 (2001) (Labor Department erred in accepting company's unverified questionnaire responses while failing to analyze contradictory evidence suggesting company responses were less than truthful); *Swiss Indus. Abrasives I,* 17 CIT at 949, 830 F. Supp. at 641 (Labor Department erred by relying exclusively on respondent company's unsubstantiated statement that imports were not in competition with domestic products); *Former Employees of Kleinert's, Inc. v. Herman,* 23 CIT 647, 654–55, 74 F. Supp. 2d 1280, 1288 (1999) (Labor Department erred in relying on unverified statements of company official in face of factual discrepancies in record).

[10] In their Reply Brief, the Roosevelt Workers assert that they are "former employees of Chevron Products Company, Roosevelt, Utah, which is a subsidiary of Chevron U.S.A., Inc., a company that engages in *the exploration and production of crude oil and natural gas*." *See* Plaintiffs' Reply Brief at 2 (emphasis added).

[11] Disputing the Roosevelt Workers claim that, as gaugers, they were "directly involved in the production process for petroleum * * * before the drivers arrive[d] * * * [to] transport the oil for refining" (*see* Plaintiffs' Brief at 8), the Government maintains that "[t]here is no evidence that the Roosevelt workers were involved in the production of crude oil, or in the exploration or drilling of crude oil." Defendant's Brief at 19–20. To the contrary, as discussed elsewhere, the record is entirely unclear as to the precise nature of the Roosevelt Workers' duties (as well as the ownership and control of the oil wells at issue, and various other pertinent facts).

program than for the TAA program.[12] And it is telling that the Labor Department's own "Findings of the Investigation" prepared in the NAFTA-TAA investigation in this case assert that the Roosevelt Workers "do not produce[ ] crude oil" or engage[] in the exploration and production of oil or natural gas"—suggesting that the agency itself interpreted the NAFTA-TAA statute to include exploration and drilling within the definition of "producing." *See* AR 10.[13]

Finally, invoking Former Employees of Permian Corp. v. United States, 13 CIT 673, 674–75, 718 F. Supp. 1549, 1550–51 (1989), the Government argues that "even assuming that Congress intended a similar definition of oil production to apply in [TAA cases and] NAFTA-TAA cases, courts have held that services unrelated to the locating and extracting of oil from the ground do not involve the production of oil or natural gas" for purposes of eligibility for trade adjustment assistance. Defendant's Brief at 20–21. However, as the court recently observed in *Marathon Ashland, Permian* involved employees of a firm that transported and marketed crude oil purchased from *unaffiliated companies*. *See Marathon Ashland,* 26 CIT at ____, 215 F. Supp. 2d at 1354 n.10 (*citing Permian,* 13 CIT at 673, 718 F. Supp. at 1549). As discussed above, the evidence in this case is at best ambiguous both as to the exact duties of the Roosevelt Workers and as to the ownership and control of the oil wells where they labored. In short, it is in fact far from clear whether those wells were in fact owned and controlled by "unaffiliated companies."

Even more fundamentally, *Marathon Ashland* casts doubt on the Government's narrow interpretations of the statute, the legislative history, and the relevant case law in support of its argument that gaugers provide services falling outside the trade adjustment assistance laws. *See generally Marathon Ashland,* 26 CIT at _____, 215 F. Supp. 2d at 1354–55.

The Labor Department has an affirmative obligation "to conduct a factual inquiry into the nature of the work performed by the petitioners to determine whether it amounted to that of service or that of production." *Former Employees of Shot Point Servs. v. United States,* 17 CIT 502, 507 (1993) (citations omitted). Indeed, more generally still, the agency "has an affirmative duty to investigate whether petitioners are members of a group which Congress intended to benefit" from trade adjustment assistance legislation. *Hawkins Oil and Gas,* 17 CIT at 129,

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[12] To the contrary, indications are that coverage under the NAFTA-TAA program was intended to be more expansive—not more restrictive—than coverage under the TAA program. For example, the NAFTA-TAA program extends benefits to secondarily-affected workers (*see* section III.B, below), and covers not only import competition but also shifts in production—a situation not covered by the TAA program. *See* Statement of Administrative Action, H.R. Doc. No. 103–159, vol. 1 at 674 (1993) (secondarily-affected workers); 19 U.S.C. § 2331(a)(1)(B) (1994) (shifts in production). *See also* H.R. Doc. No. 103–159, vol. 1 at 672 (1993) (NAFTA-TAA program intended to reflect "the best aspects of existing programs").

[13] Even if it were determined that the NAFTA-TAA statute does not include exploration and drilling for oil within the definition of "producing," the statute requires that—where petitioning workers are found to be ineligible for NAFTA-TAA benefits—the Labor Department is to automatically evaluate their eligibility for benefits under the TAA statute (which clearly includes exploration and drilling within the definition of "producing"). *See* 19 U.S.C. § 2331(c)(2) (1994). Thus, a determination that the Roosevelt Workers' duties constituted exploration and/or drilling should—in and of itself—pose no insurmountable hurdle to their cause.

814 F. Supp. at 1114 (citations omitted). As in *Marathon Oil,* the Labor Department here failed to properly discharge those duties. *See generally Marathon Oil,* 26 CIT at ____, 215 F. Supp. 2d at 1351–52 ("At best, the administrative record provides limited information discussing whether the Plaintiffs' duties as gaugers place them within the group of eligible import-impacted employees Congress intended to benefit from TAA. As such, [the] court cannot conclude that Labor * * * satisfied its requirement of reasonable inquiry, especially when viewed in light of the remedial purpose of the statute.").

Much like *Marathon Ashland,* this action too must be remanded to enable the Labor Department to address the issues raised above (for purposes of its "production workers" analysis as well as its other analyses, discussed in greater detail below). Among other things, the Labor Department shall conduct a thorough investigation of the duties of gaugers such as the Roosevelt Workers, in the context of the oil production scheme of CPDS–related entities;[14] and the agency shall make a reasoned determination on the record as to whether or not the gaugers' work constituted the provision of a service or the "produc[tion]" of an "article" within the meaning of the statute.

2. ELIGIBILITY AS "SUPPORT SERVICE WORKERS"

Even if the Labor Department makes a reasoned determination, supported by substantial evidence in the record, that the Roosevelt Workers do not "produce" an "article," they nevertheless are eligible for certification as "support service workers," 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 AR 19 (emphasis added). *See generally Bennett v. U.S. Sec'y of Labor,* 20 CIT 788, 792 (1996) (citations omitted); *Abbott v. Donovan,* 6 CIT 92, 100–01, 570 F. Supp. 41, 49 (1983) *("Abbott I")* (while legislative history and statute on its face are silent as to coverage of service workers, agency has interpreted statute to cover them in certain circumstances).

In this case, the Labor Department ruled that the Roosevelt Workers did not qualify as "service workers" based on its findings that "[t]here were no NAFTA-TAA certifications in effect for workers of Chevron Products Company" and that the Roosevelt Workers "lifted and transported crude oil that was primarily purchased from unaffiliated

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[14] Where, as here, "the company under investigation is part of a larger corporate entity, the [Labor Department] has a duty of providing a description of the [company's] organizational structure and of inquiring into how the subject company fits into the organization." *Linden Apparel Corp.,* 13 CIT at 470, 715 F. Supp. at 381. Such an investigation in this case will inform not only the agency's determinations on the Roosevelt Workers' eligibility for certification as "production workers," but also its determinations on their status as "service workers" and "secondarily-affected workers."

firms."[15] AR 10, 19, 34. But, here again, the Labor Department's findings and conclusions are not supported by substantial evidence in the record.

The first ground for the Labor Department's denial of "service worker" status concerns the Roosevelt Workers' relationship, if any, to "a *production facility* whose workers independently met the statutory criteria for certification." *See* AR 19 (emphasis added). It is not clear from the record—which has scant evidence on the point—what the Labor Department determined to be the relevant "production facility" for purposes of its "service workers" analysis. The agency's initial determination is entirely silent on the point; and the determination denying the Roosevelt Workers' request for reconsideration identifies only "Chevron Products Company" by name. AR 18–19, 34. *See also* AR 10.

In focusing on Chevron Products Company, the Labor Department apparently relied on information supplied by the company official, Ms. Aviani, who stated that drivers at the Roosevelt Facility transport crude oil to a particular Chevron Products Company facility for refining. CAR 13. But, according to the Roosevelt Workers themselves, the oil that they tested was destined for "one of three locations for refining." AR 3. If that statement is accurate, there are at least two other potential "production facilities" that the Labor Department should have considered; moreover, nothing in the record confirms that the particular refinery named by Ms. Aviani was one of the three "locations" to which the Roosevelt Workers referred. Because the agency apparently failed to identify all potentially relevant facilities, the Labor Department's investigation was inadequate to rule out the possibility that workers at at least one of the three "locations" might have "independently met the statutory criteria for certification." As discussed more fully above, the Labor Department simply was not free to rely on information supplied by Ms. Aviani, in the face of conflicting information supplied by the Roosevelt Workers (to say nothing of the other indicia casting doubt on the reliability of information provided by the company).

Although not without doubt, it appears that the Labor Department's assertion that the Roosevelt Workers "lifted and transported crude oil that was primarily purchased from unaffiliated firms" reflects the agency's consideration of another possibility: the possibility that the relevant "production facility" might be *oil wells*—the source of the crude oil—rather than the *refineries* where the crude oil was processed.

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[15] Significantly, the Labor Department did not cite the source of the oil as grounds for denying "service worker" status until its determination on the Roosevelt Workers' application for reconsideration—after an agency investigator spoke with a company official who retracted her earlier statement on the same subject to assert "that 95% of the crude * * * [was] from 3rd party wells." *Compare* AR 18–19 to AR 32–35; AR 31. *See also Linden Apparel Corp.*, 13 CIT at 470, 715 F. Supp. at 381 (rejecting Labor Department determination as "flawed" where agency investigation failed to uncover significant fact until after workers filed application for reconsideration).

See AR 34.[16] However, in making its finding that the oil "was primarily purchased from unaffiliated firms," the agency again relied on information supplied by the company official—on a point on which the company official herself reversed course.

When the Labor Department investigator contacted Ms. Aviani, he "asked if the drivers were [picking up or delivering crude] only for *Chevron wells*, and she said * * * the *wells* were either *Chevron owned or 'partner' wells."* AR 31 (emphasis added). Only later did she call back to say "that 95% of the crude picked up by the drivers in Roosevelt [was] from *3rd party wells* in which Chevron did not have a financial interest, other than purchasing the crude." AR 31 (emphasis added). The Government argues that there was no reason for the Labor Department to view Ms. Aviani's second statement "as anything other than a follow up call to provide more accurate information." Defendant's Brief at 26. To the contrary, Ms. Aviani's 1805 change of position on such a key fact should alone have sparked further investigation.[17] And, as discussed above, there were a number of other "red flags" as well. In addition, the Labor Department's exclusive focus on oil *wells* may be inappropriate, in light of the Roosevelt Workers' statement that they worked at "crude oil tanks" as well as "well head[s]"—which raises yet another potential, albeit implicit, inconsistency between Ms. Aviani's statements and those of the workers. *See* AR 3.

This action must be remanded to enable the Labor Department—if it determines that the Roosevelt Workers do not "produce" an "article"—to conduct a proper investigation to determine the appropriate "production facility" for purposes of its "service workers" analysis. And, just as the agency is obligated—in defining the "appropriate subdivision" for purposes of its "production workers" analysis—"to choose a subdivision that best effectuates the purposes of [trade adjustment assistance legislation] in light of the circumstances of the individual case" (*see Int'l Union v. Marshall,* 584 F.2d at 397), so too the Labor Department is obligated—for purposes of its "service workers" analysis—to choose a production facility "that best effectuates the purposes" of the NAFTA-TAA statute given the facts of the case at bar. Further, the reasons for the agency's "production facility" determination "must be evident in the record." *Id*. (agency's choice of plant as "appropriate

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[16] Particularly in light of the Roosevelt Workers' description of their responsibilities as "gaugers," this would seem to be entirely appropriate. As the discussion in section III.A.1 (above) suggests—based on the little evidence now in the record concerning (1) the Roosevelt Workers' duties, (2) their roles *vis-a-vis* exploration and drilling on the one hand vs. refining on the other, and (3) the organizational structure of CPDS and related corporate entities—it seems plausible to consider the Roosevelt Workers as part of either or both of two separate but related "production" processes (one "upstream" and the other "downstream"): the exploration, drilling and "production" of crude oil, or—alternatively—the "production" of refined petroleum products.

[17] In their opening brief, the Roosevelt Workers argued that it was improper for the Labor Department to rely blindly on Ms. Aviani's second statement, both because it directly contravened her initial statement and "[s]ince well production is generally 'leased' by Chevron." Plaintiffs' Brief at 12. The Government characterizes that statement as "bald and unsupported." *See* Defendant's Brief at 25–26. But the Labor Department was on notice of the existence of such leases at least as early as the Roosevelt Workers' NAFTA-TAA petition. *See* AR 3 (stating that, as price of domestic crude oil plummeted, "producers were released from lease obligations," and referring to "sale of leases" and "changed leases"). Simply stated, the agency should have thoroughly investigated the ownership and control of the oil wells in question. It will have a second opportunity to do so on remand.

subdivision" rejected where not the product of reasoned analysis in record).[18]

Moreover, after the Labor Department identifies the appropriate "production facility" (or facilities), it must determine whether workers there independently met the statutory criteria for certification. The agency thus applied the wrong test in this case when it found that "[t]here were no NAFTA-TAA certifications in effect for workers of Chevron Products Company." *See* AR 34; *see also* AR 10 (noting "no manufacturing facilities of Chevron Products Company, (CPDS) * * * under existing certification or ongoing investigation"). The question is not whether there was a certification already *in effect*. Instead, what the Labor Department must determine is whether workers at the relevant production facility met the criteria for certification—whether or not they actually sought it. *See generally Marathon Ashland,* 26 CIT at ____, 215 F. Supp. 2d at 1355 (noting that even if "Marathon Ashland did not serve [its parent company's] currently certified facilities, Marathon Ashland still may have served its parent company's other production facilities whose workers independently meet the statutory criteria"). *Cf. Champion Aviation,* 23 CIT at 354 (where petitioning workers alleged that they lost their jobs at company's Facility A because its production was shifted to company's Facility B which—in turn—shifted to a third company facility in Mexico, mere fact that workers at Facility B had not filed for adjustment assistance was insufficient basis on which to deny petitioning workers' claim); *Bennett v. U.S. Sec'y of Labor,* 20 CIT at 792 (sustaining denial of TAA to service workers where "no independent certification of [relevant] production workers could have [been] obtained.").

B. ELIGIBILITY FOR ASSISTANCE TO WORKERS IN SECONDARY FIRMS

The Roosevelt Workers contend, in the alternative, that—if they are not eligible for assistance as workers in a directly-affected firm—they are instead eligible for assistance as "secondarily-affected workers."[19] *See* Plaintiffs' Brief at 2, 10–12; Plaintiffs' Reply Brief at 1, 3–4. As the Labor Department noted in this case, under the Statement of Administrative Action accompanying the NAFTA Implementation Act, a worker group may qualify for benefits as secondarily-affected workers if the following requirements are met:

> (1) The subject firm must be a supplier—such as of components, unfinished or semifinished goods—to a firm that is directly affected by imports from Mexico or Canada or shifts in production to those countries; or
>
> (2) The subject firm must assemble or finish products made by a directly-impacted firm; and

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[18] *Cf. Lloyd v. U.S. Dep't of Labor,* 637 F.2d 1267, 1275 (9th Cir. 1980) ("The mechanical adoption of the plant as the appropriate subdivision without reasoned analysis is improper. The circumstances of each case must be examined to determine the appropriate subdivision in that case.") (citation omitted).

[19] *See, e.g.*, Plaintiffs' Reply Brief at 3 (asserting that Roosevelt Workers "qualify as secondarily affected workers because Chevron Products Co. is a supplier of crude oil for processing at Chevron Products Company, Salt Lake Refinery. At that refinery, the crude oil undergoes further processing as part of a production operation that results in refined petroleum products. The services performed by plaintiffs were an essential step in petroleum processing.").

> (3) The loss of business with the directly-affected firm must have contributed importantly to worker separations at the subject firm.

AR 37; *see also* Statement of Administrative Action, H.R. Doc. No. 103–159, vol. 1 at 674–75 (1993).[20]

Relying on three pieces of asserted "evidence," the Labor Department denied the Roosevelt Workers' petition for certification as secondarily-affected workers. Specifically, the Labor Department found:

> The workers of Chevron Products Company in Roosevelt, Utah are engaged in the employment related to lifting and transporting crude oil. The investigation revealed that the majority of crude oil lifted and transported by the Roosevelt Workers [was] purchased from 3rd parties by Chevron and transported to the refinery. The workers of the subject firm do not supply components, unfinished, or semifinished goods to a directly-affected ("primary") firm nor did they assemble or finish products made by a directly-affected firm.

AR 37. "Based on this * * * *evidence*," the agency concluded, "workers engaged in the provision of the service of lifting and transporting crude oil at Chevron Products Company, Roosevelt, Utah, * * * do not qualify" as secondarily-affected workers. AR 37 (emphasis added). However, like its determinations on the Roosevelt Workers' eligibility for assistance as "production workers" and "service workers," the Labor Department's determination on their status as secondarily-affected workers also is not supported by substantial evidence in the record.

As discussed above, this action must be remanded to permit the Labor Department to properly investigate the reliability of the first two pieces of "evidence" on which it here relies—the precise nature of the Roosevelt Workers' jobs, and the ownership and control of the oil wells (and perhaps oil tanks) in question. Thus, those "facts" as found by the Labor Department cannot constitute "evidence" in support of the agency's determination.[21]

The third and final piece of asserted "evidence" (quoted above) is not truly evidence at all, but rather an ultimate conclusion of mixed fact and law—essentially a paraphrase of the first and second criteria for secondarily-affected worker status (as outlined above), prefaced with the phrase "The workers of the subject firm do not * * *" Thus, it too cannot constitute "evidence" in support of the agency's determination. In short, not only is the Labor Department's determination on secondari-

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[20] This appears to be a case of first impression. There is no judicial precedent on claims to "secondarily-affected worker" status under the NAFTA-TAA statute.

[21] Indeed, it is not clear why the ownership and control of the oil wells would be relevant to the Roosevelt Workers' claim as "secondarily-affected workers." In contrast, for example, to a claim for benefits as "service workers" (where petitioners must establish that their separation was attributable to a reduced demand for their services from a parent firm or other closely-related entity), there is no apparent requirement that the former employer of "secondarily-affected workers" be in any way related by ownership or control to the "directly-affected firm" which was impacted by increased imports (or a shift in production).

ly-affected worker status not supported by "substantial evidence" in the record; on its face, it appears that it is supported by no evidence at all.[22]

Nor is it clear whether the Labor Department's determination was otherwise "in accordance with law." In its brief, the Government concedes that the term "supplier" is not defined in the Statement of Administrative Action accompanying the NAFTA Implementation Act. The Government nevertheless argues that the Labor Department properly determined that the Roosevelt Workers were not "suppliers." AR 24–25.

On remand, in reconsidering its determination on the Roosevelt Workers' status as secondarily-affected workers, the Labor Department will have the opportunity—if appropriate—to fully articulate its definition of any key terms, such as "supplier," and how they apply in this case. *See generally SKF USA Inc.,* 254 F.3d at 1028 (explaining rationale for rejection of appellate counsel's post hoc rationalization for agency determination) (*citing Burlington Truck Lines, Inc.,* 371 U.S. at 165–69); *Int'l Union v. Marshall,* 584 F.2d at 396 (footnote omitted) (agency determination must be "the product of a reasoned analysis evident in the administrative record"). In addition, the agency shall fully explore the precise nature of the Roosevelt Workers' jobs and their role *vis-a-vis* the production and supply chain, to ascertain whether they can fairly be said to be "suppliers" of crude oil, or—alternatively—whether they are sufficiently aligned with the refining function that they may be said to be "finishers" of oil and petroleum products.

C. Miscellaneous Alleged Irregularities

In addition to their attacks on the substantive merits of the Labor Department's determinations, the Roosevelt Workers also raise various irregularities in the conduct of the investigation. They argue, for example, that the agency erred by relying on its TAA investigation in addressing their NAFTA-TAA claim, and that the agency should have issued a NAFTA-TAA questionnaire to elicit information "specifically * * * about imports from Canada and/or Mexico." *See* Plaintiffs' Brief at 9; Plaintiffs' Reply Brief at 2. They further contend that the Labor Department should have sought clarification of "the nexus between imports and the subsequent layoffs" in this case, and that the agency's determinations improperly failed to consider the findings of Utah state officials. *See* Plaintiffs' Brief at 13; Plaintiffs' Reply Brief at 4.

The general thrust of the Government's defense is "harmless error." The Government argues, for example, that the Labor Department's decision not to issue a NAFTA-TAA questionnaire does not warrant remand because "[t]he precise level of imports from Mexico or Canada would not alter the bases for Labor's denial of certification." *See* Defendant's Brief at 23; *but see Alcatel Telecomms.,* 24 CIT at ____, No. 98–03–00540, Slip Op. 00–88, 2000 Ct. Intl. Trade LEXIS 90, at *17–20

[22] Curiously, the Labor Department's determination on the Roosevelt Workers' claim to secondarily-affected worker status states that "[t]he investigation revealed that none of the requirements, (1), (2) or (3) have been met." *See* AR 37. However, the determination cites no evidence relating directly to criterion (3). Certainly there is no reference to evidence bearing on whether imports "contributed importantly" to the Roosevelt Workers' separations. Remand will afford the agency the opportunity to address criterion (3) more fully, as appropriate.

(use of NAFTA-TAA questionnaire in TAA case is problematic and "probative of the adequacy of the investigation," although not necessarily fatal).

Similarly, the Government maintains that a remand for consideration of the state's findings is unnecessary because the only "new information" in those findings was the state's determination that the Roosevelt Workers were laid off due to imports of crude oil from Canada.[23] The Government points out that the Roosevelt Workers' application for reconsideration included a similar statement about the link between imports and layoffs, which was noted by the Labor

Department in its determination on the application; but, again, the Government argues, "the existence or level of imports from Canada [would] not change the bases" for the Labor Department's determinations in this case.[24] Defendant's Brief at 27–28.

In any event, for all the reasons detailed in sections III.A and III.B above, this action must be remanded to the Labor Department for further investigation and analysis. Accordingly, it is not necessary now to reach the specifics of the miscellaneous irregularities in the investigation. The agency will have ample opportunity to cure any such defects on remand.[25]

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[23] A copy of Utah's preliminary Findings and Recommendations are appended to Plaintiff's Brief as Exhibit 3. The Government objects both to that Exhibit and to Plaintiffs' Exhibit 1 (a copy of a Labor Department amended certification of eligibility for trade adjustment assistance for workers of Chevron U.S.A. Production Company, Business Products and Services, Department of Chevron Services Company, Division of Chevron U.S.A., Inc.). The Government argues that the exhibits are "extra record" evidence which is "not properly before [the] Court." *See* Defendant's Brief at 18–19. In any event, the Government contends, consideration of the exhibits would not warrant a different result. *Id*. at 21–23, 27–28. As discussed above, the Government argues that the state's findings were, in effect, considered by the Labor Department. And the Government dismisses Plaintiffs' Exhibit 1 as "inapposite," asserting that the situation of the Chevron workers in the other case is distinguishable from that of the Roosevelt Workers here. *Id*. at 22.

To be sure, judicial review of the Labor Department's determinations in actions such as this are confined to the administrative record. *See*, *e.g.*, *Champion Aviation*, 23 CIT at 350 (citations omitted). However, the fact that this action must be remanded for other reasons means that the Labor Department will have the opportunity to expand the administrative record—certainly to include the Findings and Recommendations of the State of Utah, and (if appropriate) the findings and determinations of the Labor Department in any relevant investigations concerning other related Chevron entities.

[24] Significantly, the Government does not argue that the Labor Department has no obligation to consider a state's findings. *See* 19 U.S.C. § 2331(b)(2)(B)(ii) (requiring Governor to transmit preliminary findings to Secretary of Labor "for action" in accordance with statute).

[25] The irregularities identified in Plaintiffs' briefs are not the only manifestations of the cursory nature of the agency's investigation. For example, the Labor Department investigator's memo documenting his contacts with CPDS's Human Resources Manager is deficient in a number of respects. *See* AR 31. That memo—which bears the docket number not of the NAFTA-TAA investigation, but rather of the TAA investigation—purports to memorialize the substance of two critical phone conversations. However, the memo is itself undated; and it does not specify either the date of the first conversation (which apparently occurred in "May, 2000") or even the month or year of the second conversation (which is said only to have occurred sometime "later"). In short, the memo is not a contemporaneous record memorializing the investigator's contacts, and is of dubious reliability.

Similarly, although the Roosevelt Workers' petition asserted a claim to benefits as "secondarily-affected workers," the Labor Department's initial determination failed to consider that claim. *Compare* AR 1–2 *with* AR 10, 18–19, 24– 28. The agency considered the petitioners' potential status as secondarily-affected workers for the first time only after they filed their application for reconsideration. *See* AR 36–38. The error is likely attributable to the agency's initial decision not to conduct a new investigation in response to the NAFTA-TAA petition, but rather to rely on the results of its earlier TAA investigation. Because the TAA program does not afford relief to secondarily-affected workers, the agency's TAA investigation did not address the elements of such a claim. The oversight is nevertheless telling. *See generally Linden Apparel Corp.,* 13 CIT at 470, 715 F. Supp. at 381 (rejecting Labor Department determination as "flawed" where agency investigation failed to uncover significant fact until after workers filed application for reconsideration).

Even the very face of the file betrays the sloppiness of the investigation. The agency's official "Notice of Negative Determination Regarding Application for Reconsideration" is incomplete. *See* AR 32–35. The last line of the penultimate page of the notice stops mid-sentence, and the following (final) page begins "Conclusion."

While they may be relative inconsequential considered in isolation, the cumulative effect of such defects is to reinforce the impression of an investigation which was *pro forma* at best.

IV. CONCLUSION

As detailed above, the Labor Department failed to fulfill its affirmative obligation to conduct its investigation "with the utmost regard" for the interests of the Roosevelt Workers. *See Stidham v. U.S. Dep't of Labor,* 11 CIT at 551, 669 F. Supp. at 435 (citations omitted). Accordingly, this action must be remanded for further investigation and analysis of the Roosevelt Workers' petition for certification of eligibility to apply for transitional adjustment assistance under the NAFTA-TAA statute.

It remains to be seen whether further investigation and analysis will change the outcome; it may or may not. But, even if a more detailed inquiry does not alter the result, at least the Roosevelt Workers will be afforded a thorough determination which is supported by substantial evidence and is the product of a reasoned analysis evident in the administrative record. *See Int'l Union v. Marshall,* 584 F.2d at 396, 397–98. They are entitled to no less.

A separate order will enter accordingly.

(Slip Op. 02–132)

FORD MOTOR CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–03–00164

(Dated October 28, 2002)

ORDER

CARMAN, *Chief Judge:* Upon reading Plaintiff's Motion for Entry of Judgment: upon Defendant's consent thereto and upon discussion with parties and upon consideration of other papers and proceedings herein, it is hereby

ORDERED that a certain Order dated October 18, 2002 signed by the Court in this proceeding and designated as Slip Op. 02–127 is hereby vacated; and it is further

ORDERED that Plaintiff's motion be, and hereby is granted; and it is further

ORDERED that judgment be, and hereby entered for plaintiff, Ford Motor Company; and it is further

ORDERED that the entries covered by this action be deemed liquidated by operation of law "as entered" under 19 U.S.C. 1504(a) (1982); and it is further

ORDERED that Customs reliquidate the entries covered by this action in accordance with this Order and refund to Ford Motor Company the increase in duties assessed together with interest from the date of payment of the increased duties to the date of reliquidation.

ANNOUNCEMENT

Chief Judge Gregory W. Carman has announced the call of the 12th Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Wednesday, November 13, 2002 at the New York Marriott Marquis (45th Street & Broadway), 1535 Broadway, New York, New York and will commence promptly at 9:00 a.m.

The theme of the Conference is: **"The Future is Now—The Impact of Change on Practice at the Court."**

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 300 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the Court's prior Judicial Conferences.

All interested persons are invited to attend. The Conference program, registration forms and additional information may be obtained through the Judicial Conference page on the Court's website, **www.cit.uscourts.gov** or by contacting the Clerk's Office at 212–264–2800.

Dated: October 7, 2002.

LEO M. GORDON,
Clerk of the Court.