Decisions of the United States Court of International Trade

Slip Op. 04–105

NSK LTD. and NSK CORPORATION, *et al.*, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORP, Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 02–00627
PUBLIC VERSION

[United States Department of Commerce's Final Results are affirmed in part and remanded in part.]

Dated: August 20, 2004

Riggle and Craven, (*David A. Riggle* and *David J. Craven*) for Plaintiff and Defendant-Intervenor Asahi Seiko Co., Ltd.

Wilkie Farr & Gallagher, (*Kenneth J. Pierce*, *Miriam A. Bishop*, and *Robert E. DeFrancesco*) for Plaintiff and Defendant-Intervenor Isuzu Motors, Ltd.

Stewart and Stewart, (*Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for Plaintiffs and Defendant-Intervenors MPB Corp. and Timken U.S. Corp.[1], respectively.

Crowell & Moring, LLP, (*Matthew Philip Jaffe*, *Robert A. Lipstein*, and *Grace Lawson*) for Plaintiffs and Defendant-Intervenors NSK Corp., NSK Ltd., NSK Bearings Europe, Ltd.

Barnes, Richardson & Colburn, (*Donald J. Unger* and *Kazumune V. Kano*) for Plaintiffs and Defendant-Intervenors NTN Corp., NTN Bearing Corp. Of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft, Inc., and NTN-BCA Corp.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Paul D. Kovac*, Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Peter G. Kirchgraber*, *Philip Curtin*, *Elizabeth Doyle*, *Marisa Goldstein*, *Peter Kaldes*, *Barbara Tsai*, Attorney Advisors, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant United States.

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[1] During the July 7, 2004, oral argument, counsel for Timken U.S. Corp. clarified that Timken had bought the Torrington Company, the Defendant-Intervenor during the administrative proceedings, and that the two companies were "now one and the same." Torrington and Timken are thus used interchangeably throughout the Slip Op., depending on the timing of the document cited or argument made.

OPINION

Wallach, Judge:

I
INTRODUCTION

In this action, Plaintiffs NSK Ltd., NSK Corp., (collectively "NSK Japan"); NSK Bearings Europe, NSK Corp., (collectively, "NSK Europe"); NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft, NTN-BCA Corp., (collectively, "NTN"); MPB Corp. ("MPB"); Asahi Seiko Co. ("Asahi"); and Isuzu Motors, Ltd. ("Isuzu") challenge the final results of an administrative review issued by the United States Department of Commerce ("Commerce") with respect to *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Administrative Reviews*, 67 Fed. Reg. 55,780 (Aug. 30, 2002) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2002). For the following reasons, Commerce's determination is affirmed in part and remanded in part.

II
BACKGROUND

On May 15, 1989, the Department published in the Federal Register the antidumping duty orders on ball bearings ("BBs") and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom and on spherical plain bearings and parts thereof from France. *Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Thailand*, 54 Fed. Reg. 20,909 (May 15, 1989) ("Original Investigation"). On June 19, 2001, Commerce published a notice of initiation of the twelfth administrative review of these orders, covering a period of review ("POR") of May 1, 2000, through April 30, 2001, for the subject Japanese BBs. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 66 Fed. Reg. 32,934 (June 19, 2001) ("Initiation of Twelfth Administrative Review").

Commerce published the preliminary results in this administrative review in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and The United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Rescission of Administrative Reviews*, 67 Fed. Reg. 17,361 (April 10, 2002) ("Preliminary Results"). Commerce issued the Final Results on August 30, 2002. The scope of this order covers ball bearings, mounted or unmounted, and parts thereof, including all antifriction bearings that employ balls as the rolling element. Final Results, 67 Fed. Reg at 55,780. Products that fall under these parameters include antifriction balls, BBs with integral shafts, BBs (including radial BBs) and parts, and housed or mounted BB units and parts.[2] *Id*. In the Final Results, Commerce found a 6.07% weighted-average margin for NSK Japan, 16.87% for NSK Europe, 9.72% for NTN, 2.51% for Asahi, and 73.55% for Isuzu. *See id*. at 55,781.

III
PARTIES' ARGUMENTS

Asahi, NSK Europe, and NSK Japan challenge Commerce's decision to assign a zero margin to sales above normal value when calculating the weighted average dumping margin. Commerce and Timken argue that Commerce's methodology is supported by substantial evidence and is in accordance with law.

Asahi claims that, because service was made to it after the regulatory deadline by Torrington, Commerce improperly initiated its administrative review. Commerce and Torrington posit that Commerce conducted the administrative review of Asahi in accordance with law.

Asahi disputes Commerce's use of model-specific methodology to conduct its below-cost test. Commerce and Torrington argue that its methodology is supported by substantial evidence and is in accordance with law.

Commerce and Timken argue that Isuzu did not exhaust its administrative remedies and thus is now precluded from relying upon certain proprietary information to support its corroboration argument. Isuzu claims, on the contrary, that the Government waived the exhaustion argument by consenting to its access to information protected under the Judicial Protective Order in this case.

Isuzu challenges Commerce's adverse facts available determination, applying the highest calculated rate and corroborating it with contemporaneous sales, after Isuzu did not cooperate in this review. Commerce and Timken argue that Commerce's choice of adverse facts available rate is supported by substantial evidence and is in accordance with law.

MPB claims that Commerce's determination to accept NTN's reported cost data is erroneous. NTN argues that it reported its cost

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[2] These products are classified under the following subheadings in the Harmonized Tariff Schedule of the United States (HTSUS):

> 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

Final Results, 67 Fed. Reg at 55,780.

data accurately and Commerce agrees that NTN responded adequately to the questionnaires.

NSK Europe states that Commerce improperly interpreted "foreign like product" for calculating constructed value. Commerce and Timken say that the Federal Circuit has affirmed Commerce's interpretation.

NTN argues that Commerce incorrectly applied adverse facts available in calculating its home-market and U.S. freight expenses. Commerce, MPB, and Timken state that Commerce's methodology is supported by substantial evidence and is in accordance with law.

NTN challenges Commerce's treatment of inputs that NTN obtained from affiliated suppliers in calculating cost of production and constructed value. Commerce, Torrington, and Timken argue that Commerce's determination is supported by substantial evidence and is in accordance with law.[3]

NTN points out that there were clerical errors in the amended final results computer program that affected the accuracy of NTN's dumping margin. Commerce agrees and requests a remand to exclude export price sales from NTN's U.S. freight and warehouse expense calculations.

IV
STANDARD OF REVIEW

This court will uphold an administrative antidumping determination 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) (2002); *SKF United States v. INA Walzlager Schaeffler KG*, 180 F.3d 1370, 1374 (Fed. Cir.1999). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion." *Aimcor, Alabama Silicon, Inc. v. United States*, 154 F.3d 1375, 1378 (Fed. Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "[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. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966). It is not the court's duty to "weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramericana de*

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[3] During the July 7, 2004, oral argument, counsel for NTN stated that pursuant to *NTN Corp. v. United States*, 306 F. Supp.2d 1319 (CIT 2004), NTN was "abandoning" its claim challenging Commerce's determination to use the highest transfer price, cost of production, or market value to value the major inputs NTN purchased from its affiliated supplier. Accordingly, the issue is moot.

Aleaciones Laminadas v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

In examining an agency's interpretation of a statute, this court is confronted with two questions. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). First, the court must consider if "Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If Congress has not spoken directly on the issue, this court cannot simply impose its own construction of the statute, but instead looks at whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843. "[I]t is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). A court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978).

V
ANALYSIS

A
Commerce's Decision to Assign a Zero Margin to Sales Above Normal Value in Calculating the Dumping Margin Is Supported by Substantial Evidence and Is In accordance with Law

1
Commerce's Decision to Assign a Zero Margin is In Accordance with U.S. Statute

Asahi, NSK Japan, and NSK Europe challenge Commerce's assignment of a zero margin to export price ("EP") or constructed export price ("CEP") sales made above normal value ("NV"). While conceding that this court has upheld Commerce's methodology previously, NSK Japan and NSK Europe argue that the "methodology so biases antidumping calculations that the presence of a single U.S. sale below normal value can produce a dumping margin, even though there exists hundreds of sales for which the opposite is true." NSK Ltd. & NSK Corp. Motion for Judgment on the Agency Record ("NSK Japan's Motion") at 6; NSK Bearings Europe Ltd. & NSK Corp's Motion for Judgment on the Agency Record ("NSK Europe's Motion") at 7. NSK Japan and NSK Europe claim that the definition of dumping in 19 U.S.C. § 1677(35)(A)[4] "reaffirms that dumping only exists when normal value exceeds export price or constructed export price *of the subject merchandise*," thus reiterating that the "focal point of any antidumping inquiry is the class of merchandise." NSK Japan's Motion at 7 (emphasis in original); NSK Europe's Motion at 8–9 (emphasis in original). NSK Japan argues that Commerce calculated a 6.07% dumping margin on BBs while over 85% of its U.S. sales exceeded NV and that the overall margin for BBs class of merchandise was (−18.78%). NSK Japan's Motion at 11. NSK Europe similarly argues that Commerce calculated a 16.87% margin on BBs though over one-half of its sales exceeded NV and the overall margin for BBs was (−7.93%). NSK Europe's Motion at 12–13.

Commerce argues that U.S. antidumping law directs the agency to assign a zero value to sales where the U.S. price, the EP or CEP, exceeds NV. Defendant's Response in Partial Opposition to the Motions for Judgment upon the Agency Record Filed by Asahi Seiko, Isuzu, MPB, NSK Europe, NSK Japan, and NTN ("Defendant's Response") at 12. Commerce states that

> [t]his effectively excludes "all non-dumped sales or sales with 'negative' margins." *PAM, S.p.A. v. United States*, slip op. 03–48 at *6 (CIT May 8, 2003). "At the same time, Commerce includes the value of dumped sales in the dumping margin, which are therefore referred to as sales with a 'positive' margin." *Id.* The percentage of the weighted average dumping margins determined for a specific exported or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677 (35)(B). In the *Final Results*, Commerce applied this methodology and assigned a zero value for Asahi, NSK Europe, and NSK Japan. *Decision Memo* at Comment 3, P. App. at Tab 2.

Id. at 11. To support its arguments, Commerce first asserts that the plain language of the statute requires it to focus on sales prices "below" fair value. For, 19 U.S.C. § 1677(35)(A) defines dumping as the "amount by which the [NV] *exceeds* the [EP] or [CEP] of the subject merchandise." *Id.* at 12 (emphasis in original). Second, "weighted average dumping margin" is defined as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). This, Commerce argues, leads to the conclusion that the statute directs Commerce to aggregate entries when the NV exceeds the U.S. price in determining the "weighted-average dumping margin." Com-

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[4] The statute, 19 U.S.C. § 1677(35)(A), states: "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."

merce claims that this methodology does not ignore the non-dumped sales because

> [t]his does not mean, however, that we ignore sales that were not priced below normal value in calculating the weighted-average rate. It is important to recognize that the weighted-average margin will reflect any "non-dumped" merchandise examined during an investigation or review because the value of such sales is included in the denominator of the weighted-average dumping margin calculation while no dumping amount for "non-dumped" merchandise is included in the numerator. Thus, a greater amount of "non-dumped" merchandise results in a lower weighted-average margin.

Issues and Decision Memorandum for the Administrative Reviews of Ball Bearings (other than tapered roller bearings) and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom — May 1, 2000, through April 30, 2001, A–100–001, from Richard W. Moreland, Deputy Assistant Secretary for Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration (August 3, 2002) ("Issues and Decision Memorandum") at 13; Defendant's Response at 14. Moreover, Commerce cites that its methodology is reasonable and that a number of cases from this court have upheld its weighted-average dumping methodology. It argues that if it were to offset the dumping margins with sales greater than NV, there would be a canceling out of margins which would in turn permit the selective use of dumping. Defendant's Response at 16.

The Defendant-Intervenor Timken supports Commerce's use of zeroing methodology. It claims that U.S. law requires zeroing, as "dumping margin" is defined as the amount by which NV "*exceeds*" EP or CEP and a "weighted dumping margin is the sum of 'dumping' margins,' " not the sum of dumping margins and the amounts by which export or constructed export prices exceed normal value." Response of Timken U.S. Corporation, Defendant-Intervenor, to the Rule 56.2 Motions of Asahi Seiko Co., Ltd., et al. ("Timken's Response") at 22. Timken argues that the history of antidumping duty administration, since the Antidumping Duty Act of 1921, shows that U.S. authority has computed dumping margins on an entry-by-entry basis and has even responded in the negative for requests of including negative margins in its regulations. *Id.* at 23 (citing U.S. Administration of the Antidumping Act of 1921, Report by the Comptroller General to the Congress of the United States at 33, ID–79–15 (Mar. 15, 1979) and *Antidumping and Countervailing Duties; De Minimis Dumping Margins and De Minimis Subsidies*, 52 Fed. Reg. 30,660, 30,662 (Aug. 17, 1987) concerning 19 C.F.R. § 353.24(b)(1989)). Timken further argues that neither the legislative history of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), nor the URAA, Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–826, at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, set out changes to Commerce's zeroing methodology. *See* Timken's Response at 27. Timken states that in the URAA the "crafters of the law intended to implement the requirements for fair comparison as they understood them: by defining what prices were to be used and how they were to be adjusted to determine normal value." *Id.* at 28. Thus, Timken finds Commerce's interpretation of 19 U.S.C. § 1675(a)(2)(A) to be reasonable.

Commerce's zeroing methodology has been upheld by this court and the Federal Circuit as reasonable on many previous occasions. *See Timken Co. v. United States*, 354 F.3d 1334, 1340–45 (Fed. Cir. 2004); *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1370 (CIT 2003); *Corus Staal BV v. United States* 259 F. Supp. 2d 1253, 1260–65 (CIT 2003); *Timken Co. v. United States*, 240 F. Supp. 2d 1228 (CIT 2002); *Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States*, 20 CIT 558, 570 (1996); *Serampore Indus. Pvt. Ltd. v. United States*, 11 CIT 866, 873–74 (1987). Because, however, the "statute is silent on the question of zeroing negative dumping margins," *see Bowe Passat*, 20 CIT at 572, *see also Timken*, 354 F.3d at 1341–42, in determining whether Commerce's interpretation is in accordance with the law, this court applies the *Chevron* standard. *See also Corus Staal BV*, 259 F. Supp. 2d at 1261. This inquiry examines whether Commerce's interpretation of the statute is reasonable and sustains the interpretations if the answer is in the affirmative. *See PAM, S.p.A.*, 265 F. Supp. 2d at 1371; *Fujtsu Gen. Ltd. v. United States*, 88 F. 3d 1034, 1038 (Fed. Cir. 1996).

Commerce and Timken justify the use of zeroing, pointing out that 19 U.S.C. 1677(35)(A) defines a dumping margin as the amount by which NV "*exceeds*" EP or CEP; and, the dictionary definition of "exceeds" is "[t]o be greater than; surpass." The American Heritage Dictionary of the English Language 638 (3d ed. 1996). Addressing this issue, the Federal Circuit in *Timken*, 354 F.3d at 1342, stated that

> while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction. Basically, one number "exceeds" another if it is "greater than" the other, meaning it falls to the right of it on the number line. Here, because Commerce's zeroing practice is a reasonable interpretation of the statutory language, we do not question it in light of other reasonable possibilities.

Furthermore, "weighted average dumping margin," as defined in 19 U.S.C. § 1677 (35)(B), requires Commerce to take the aggregate dumping margin and divide it by the aggregate export prices, which include all prices of *all* sales. *PAM, S.p.A.*, 265 F. Supp. 2d at 1371. In considering the policy backdrop to the statute, Commerce also convincingly points out that offsetting dumping margins with sales greater than NV would allow foreign companies to practice selective dumping. *See Timken*, 354 F.3d at 1342–43. Thus, zeroing prevents foreign producers from "masking [their] dumping with more profitable sales." *Serampore Indus.*, 11 CIT at 874; *see Timken*, 354 F.3d at 1343. Accordingly, Commerce's interpretation of the U.S. statute, using dumped sales in the aggregate and dividing these by all sales, including nondumped sales, is a reasonable interpretation of the statute. *See PAM, S.p.A.*, 265 F. Supp. 2d at 1371.

2
Commerce's Decision to Assign a Zero Margin is In Accordance with U.S. WTO Obligations

Asahi, NSK Japan, and NSK Europe claim that, in employing zeroing methodology, Commerce has interpreted and applied the U.S. statute in a WTO-inconsistent manner. Asahi argues that Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") "require[s] a fair comparison of margins, and zeroing violates this precept." Motion of Asahi Seiko Co. Ltd. for Judgment on the Agency Record Pursuant to Rule 56.2 ("Asahi's Motion") at 9. Asahi, NSK Japan and NSK Europe argue that the WTO Panel Report in *European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/AB/R (Mar. 1, 2001) ("*EC - Bed Linen*"), which deemed the EC's zeroing methodology to be WTO-inconsistent, supports its argument that Commerce's zeroing methodology is WTO inconsistent.[5] NSK Japan and NSK Europe also point out that the WTO Panel's decision in *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (Feb. 28, 2001), in which it determined that the arm's length test failed to give equal weight to affiliated transactions that occurred above and below prices of unaffiliated transactions, underscores the idea that the "antidumping law's 'fair comparison' requirements are not met when there is an identifiable bias in the methodology employed." NSK Japan's Motion at 9; NSK Europe's Motion at 11.

Commerce argues that the WTO AD Agreement and the Appellate Body decision in *EC — Bed Linen* "have no effect upon this proceeding, which is governed by United States statutory law." Defendant's Response at 18–19. Furthermore, Commerce challenges Plaintiffs'

[5] NSK Japan says that "NSK Japan rests its case on U.S. antidumping law. Our discussion of the WTO Panel decisions serves only to demonstrate that international legal authorities concur that NSK Japan is right and Commerce is wrong." NSK Japan's Motion at 7 n. 19. NSK Europe similarly states "NSK Europe rests its case on U.S. antidumping law. Our discussion of the WTO Panel decisions serves only to demonstrate that international legal authorities concur that NSK Japan is right and Commerce is wrong." NSK Europe's Motion at 9 n. 22.

ability to bring this WTO consistency claim for want of standing. It claims that allowing Plaintiffs to bring such a claim frustrates the explicit intent of Congress in U.S. statute and the SAA. If Plaintiffs have standing to bring a WTO claim, Commerce argues that Article 2.4.2 of the AD Agreement do not apply because the WTO Agreement is not self-executing. Commerce also posits that *EC — Bed Linen*, as a WTO Appellate Body decision, has no binding effect on the U.S. as per the SAA. As a result, Commerce asserts, its zeroing methodology does not violate U.S. obligations under international law. Defendant's Response at 22.

Timken argues that the U.S. is under no obligation to follow WTO panel and Appellate Body reports, as they are only binding on the WTO Member countries who are parties; even then, the particular member has a variety of options in terms of what actions it can take in response to a WTO ruling and U.S. law does not integrate automatically WTO rulings. *See* Timken's Response at 31–34. In particular, Timken argues that *EC — Bed Linen* does not apply to the case at hand because it deals with the computation of dumping margins during an antidumping investigation and not an administrative review. Similarly, Article 2.4.2 applies only to investigations and not reviews. Thus, Timken sees no conflict between Commerce's zeroing methodology, the WTO AD Agreement, and *EC — Bed Linen*. Timken's Response at 37.

Commerce's zeroing methodology is not WTO-inconsistent.[6] *See Timken*, 354 F.3d at 1344. This court considers the relationship between a U.S. statute and U.S. international obligations, because, pursuant to the *Charming Betsy*[7] doctrine, "it has . . . been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." 6 U.S. at 188. The WTO AD Agreement does not explicitly prohibit the practice of zeroing, nor does it use the term "zeroing." *PAM, S.p.A.*, 265 F. Supp. 2d at 1373; *Corus Staal*, 259 F. Supp. 2d at 1263. Specifically, AD Agreement Article 2.4.2. states that dumping margins should be based on a "comparison of a weighted average normal value with a

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[6] Commerce claims that pursuant to 19 U.S.C. § 3512(c)(1) that Plaintiffs have no standing to challenge its interpretations of U.S. statute vis-a-vis the WTO Agreements and Reports, because the statute states that "no person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any agency . . . on the ground that such action or inaction is inconsistent with [the URAA]." As in *Timken v. US*, 240 F. Supp. 2d at 1238, the Plaintiffs Asahi, NSK Japan, and NSK Europe are "not bringing this action under any WTO agreement; rather, [they are] arguing that the Department's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement." They are "free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so." *Gov't of Uzbekistan v. United States*, Slip Op. 01–114 at 11, 2001 Ct. Int'l Trade LEXIS 113 (Aug. 30, 2001). Thus, here as in the aforementioned cases, the Department's reliance on 19 U.S.C. § 3512(c) is an "erroneous technical bar." *Id.*

[7] *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118, 2 Cranch 64, 2 L. Ed. 208 (1804).

weighted average of prices of all comparable export transactions. . . .” While the Plaintiffs argue that Commerce disregards the nondumped transactions through zeroing, as explained in *Bowe Passat*, nondumped sales are not ignored but are assigned the value of zero and combined with the dumped sales in calculating the overall margin. 20 CIT at 570–71. The negative margin sales thus have the “effect of diluting the dumping margin, making the margin lower than it would otherwise be if . . . these sales were totally disregarded and were not given any credit in the analysis.” *Id.* at 571–72. Thus, Commerce does take into account non-dumped sales and has not interpreted U.S. statute in contravention of the WTO AD Agreement by employing its zeroing methodology.[8]

Because Commerce has employed the zeroing methodology in a manner which is reasonable in light of the WTO AD Agreement, this court defers to Commerce’s interpretation and application of the U.S. statute and finds it to be in accordance with law.

B
Commerce’s Decision to Conduct Asahi’s Administrative Review, though Asahi Was Not Properly Served Notification of the Review’s Initiation, Is In Accordance With Law

Asahi claims that Commerce improperly initiated its administrative review of Asahi and should instead have rejected request for Asahi’s review by Petitioner, Torrington Company. Issues and Decision Memorandum at 93. It argues that when Torrington requested a review of Asahi, it failed to notify Asahi of its request and that Asahi only learned of the request for review in the Initiation of Twelfth Administrative Review, 66 Fed. Reg. at 32,934. *Id.* at 93–94. Asahi explains that while the request for review has its correct address, the certificate of service did not show Asahi as having been served. *Id.* at 94. Asahi states that it immediately brought the insufficiency of service to Commerce’s attention. Asahi’s Motion at 11; *see* Letter from David A. Riggle to Ms. Holly Kuga, U.S. Department of Commerce, Import Administration (June 20, 2001). Asahi argues that, because

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[8] Based on distinguishing facts, Commerce’s zeroing methodology was found to be reasonable by the Federal Circuit in *Timken*, 354 F.3d at 1344, even though the WTO Appellate Body found similar zeroing methodology used by the EC to be inconsistent with the AD Agreement Article 2.4.2 in *EC — Bed Linen*. While WTO adjudicatory decisions may be persuasive, they are not binding on Commerce or this court. *See* SAA at 1032; *Timken*, 354 F.3d at 1344; *Hyundai Elec. Co. v. United States*, 23 CIT 302, 311 (1999). Indeed, they are not even binding on the WTO adjudicatory system as they do not have the *stare decisis* effect of common law. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 2, vol. 31, 33 I.L.M. 1226 (1994), Article 3(2). “WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved. They are not binding upon other signatory countries or future WTO panels.” *Corus Staal*, 259 F. Supp. 2d at 1264.

Torrington did not follow the requirements of 19 C.F.R. § 351.303[9] and because it cannot argue that it made a reasonable effort to serve Asahi as it did not, Commerce should have rejected Torrington's request for review. Asahi claims that the delay in notification burdened it as it had not been involved in the immediately preceding review and "may have been the reason for the increase in the antidumping margin calculated in the review. . . . At the very least it contributed to the partial Facts Available rate calculated in the preliminary results." Asahi's Motion at 14.

The Defendant-Intervenor Torrington cited *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 53808 (Oct. 16, 1997) and argued that due to the shortness of the delay in receiving the review request and to the fact that Asahi had participated in six previous reviews, Commerce's determination to treat the delay as harmless was within its discretion. Issues and Decision Memorandum at 94. Timken states that Commerce was right to conclude that Torrington made a reasonable effect to correct the omission by faxing the request on June 20, 2001, thus mitigating the mistake. Timken's Response at 52. It also claims that, because Asahi participated in the review, it waived its objection to the delay. Timken asserts that this delayed service constituted harmless error, if any. *Id.* at 53.

Commerce argues that it should not have rejected Torrington's request for review of Asahi. Torrington filed its request for an administrative review on the antidumping duty orders upon BBs and parts from France, Germany, Italy, Japan, and the United Kingdom on

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[9] The relevant parts of the 19 C.F.R. § 351.303 state:

Sec. 351.303 Filing, format, translation, service, and certification of documents.

. . .

(f) Service of copies on other persons. (1)(I) In general. Except as provided in § 351.202(c) (filing of petition), § 351.207(f)(1) (submission of proposed suspension agreement), and paragraph (f)(3) of this section, a person filing a document with the Department simultaneously must serve a copy of the document on all other persons on the service list by personal service or first class mail.

. . .

(3) Service requirements for certain documents.

. . .

(ii) Request for review. In addition to the certificate of service requirements under paragraph (f)(2) of this section, an interested party that files with the Department a request for an expedited antidumping review, an administrative review, a new shipper review, or a changed circumstances review must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request and on the petitioner by the end of the anniversary month or within ten days of filing the request for review, whichever is later. If the interested party that files the request is unable to locate a particular exporter or producer, or the petitioner, the Secretary may accept the request for review if the Secretary is satisfied that the party made a reasonable attempt to serve a copy of the request on such person.

May 31, 2001. Defendant's Response at 22; *See* Letter from Law Firm of Stewart and Stewart: Request for Administrative Review on Behalf of Petition for Period 5/1/00–4/30/01 (May 31, 2001). Though Asahi should have been served with a copy of the request by June 10, 2001, pursuant to 19 C.F.R. § 351.303, it did not receive formal notification until the publication of the Initiation of Twelfth Administrative Review on June 19, 2001. Defendant's Response at 23. Despite the delay in notification, Commerce did not issue its questionnaire until June 28, 2001 and thus "took no action to prejudice Asahi during the nine-day period which Asahi lacked notice." *Id.* at 25; Issues and Decision Memorandum at 94. Commerce argues that Torrington made a reasonable effort to serve Asahi with the request; because, after it realized it had made the error, it faxed Asahi a copy of the request on June 20, 2001. Issues and Decision Memorandum at 94. Commerce states that the Supreme Court has granted the judiciary as well as administrative agencies the discretion to relax and modify procedural rules if justice warrants it. Defendant's Response at 24 (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)).

Commerce claims, pursuant to *Am. Farm Lines*, that two criteria need to be met for a Court to require an agency to abide strictly by its regulations. First, the regulations have to confer important procedural benefits. *Am. Farm Lines*, 397 U.S. at 538–39. Here, 19 C.F.R. § 351.303 does not specify consequences for an untimely service of notice and, while Asahi argues that there is one exception to the service requirement, the regulation does not require Commerce to reject a request for review based on a deficient service. Second, the plaintiff must show substantial prejudice. *Id.* Asahi has not demonstrated substantial prejudice, because Commerce says "there is no prejudice in being denied additional time to prepare, where such additional time is not provided for or even contemplated in the statute or the regulations." Defendant's Response at 28. Commerce thus argues that it does not accept Asahi's argument that it had insufficient time to prepare for the review and "the exemption of a foreign producer (Asahi) from an administrative review based upon a minor service technicality could potentially lead to an inaccurate dumping margin and the perpetuation of injury to the domestic injury that the antidumping duty statute was designed to prevent." *Id.* at 25.

Commerce was within its discretion to continue the administrative review of Asahi. The regulation at issue, 19 C.F.R. § 351.303(f)(3)(ii) (2001), states that in a request for an administrative review, the petitioner "must serve a copy of the request" to the "exporter or producer specified . . . within ten days of filing the request for review." The regulation provides an exception so that if the petitioner is unable to locate the exporter or producer, Commerce may still accept the request for review if it "is satisfied that the party made a reasonable attempt to serve a copy of the request on such person." 19 C.F.R.

§ 351.303(f)(3)(ii). The regulation, however, as Commerce points out, does not direct Commerce to rescind a review because service was faulty and neither provides for penalties nor instructs Commerce on what it should do in cases such as the one at hand. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 395–96 (Fed. Cir.1996) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction. . . . [There] is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent.") (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63–64, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993)).

The Supreme Court in *Am. Farm Lines* stated that

> "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

397 U.S. at 539 (citing *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953)). The regulatory notice requirement at issue is procedural, which is highlighted by the title of the regulation itself: "Filing, format, translation, service, and certification of documents." The Federal Circuit has held that Commerce's failure to comply with a regulatory notice requirement did not void the agency's action or compel the court to revoke the antidumping finding. *Intercargo Ins. Co.*, 83 F.3d at 396 (citing *Kemira Fibres Oy v. United States*, 61 F.3d 866 (Fed. Cir. 1995). The court's reasoning in *Kemira Fibres* was that the Plaintiff "should not become immune from the antidumping laws because Commerce missed the deadline. The national interest in the regulation of importation should not fall victim to an oversight by Commerce." 61 F.3d at 873.

As the regulation here was "not intended to confer important procedural benefits, . . . for Plaintiff to prevail on its procedural claims it must demonstrate that it was substantially prejudiced by Commerce's actions." *Taiyuan Heavy Mach. v. United States*, 23 CIT 701, 703 (1999). Asahi has not adequately shown that it was substantially prejudiced by the untimely service. Asahi had notice on June 19, 2001, from the Federal Register, that Torrington had requested its inclusion in the administrative review. *See Lyng v. Payne*, 476 U.S. 926, 942–43, 106 S. Ct. 2333; 90 L. Ed. 2d 921 (1986) (citing 44 U.S.C. § 1507 stating that publication in Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it"). June 19, 2001, was only nine days after Asahi should have been notified by Torrington pursuant to the regulation, but Commerce did not issue its questionnaires, its first request for information from the parties in the review, until June 28, 2001.

As Asahi states, it was thus deprived of being able "to begin to prepare for" the review. However, "[a] party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice . . . means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo Ins. Co.*, 83 F.3d at 396. Here, nine fewer days of preparation time, prior even to the receipt of Commerce's questionnaire, does not constitute such substantial prejudice that a remand is required on this issue. The public interest and domestic industry should not "fall victim" to such a procedural defect, if the oversight has not had a cognizable prejudicial impact on the Plaintiff. *Id.* Therefore, Commerce's determination to accept Torrington's request for the review of Asahi is in accordance with law.

C
Commerce's Use of Model-Specific Methodology In Calculating Cost of Production for Asahi is Supported by Substantial Evidence and Is In Accordance With Law

Asahi disputes Commerce's conclusion that Asahi made home market sales in substantial quantities at below the cost of production ("COP"). Referring to 19 U.S.C. § 1677(16) and Commerce's regulations in *Antidumping Duties; Countervailing Duties,* 62 Fed. Reg. 27,296, 27,412 (May 19, 1997), Asahi argue that the overall 20% below-cost determination has to be done on a foreign like product basis, as per 19 C.F.R. § 351.406, and not a model-specific basis. Issues and Decision Memorandum at 66. Because it claims that foreign like product refers to the overall product[10], not individual models, Asahi argues that the COP analysis should be based on total sales of ball bearings, those above as well as below cost. *Id.*; Asahi's Motion at 16–17. Asahi basis its claim of required aggregation on the distinction between the terms "foreign like product" in 19 U.S.C. § 1677(16) and 19 U.S.C. § 1677b(b) and "subject merchandise" in 19 U.S.C. § 1677b(a)(1)(A), arguing that the former term supposes a broader category beyond just the model of merchandise. Asahi further argues that because 19 U.S.C. § 1677b(b)(2)(C)(I) directs Commerce to examine whether below cost sales were made in substantial quantities, or over 20% of the total volume of sales, and this was not the case; thus, Commerce did not meet its statutory burden. Issues and Decision Memorandum at 66.

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[10] Commerce determined in the Original Investigation that there were five categories which comprised the "like product": ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings, and plain bearings. 54 Fed. Reg. At 18,998.

Torrington also referred to 19 U.S.C. § 1677b(b)(2)(C)(I) and argues that Commerce interprets the phrase "the volume of sales under consideration for the determination of foreign market" to refer to sales of the model it examined. *Id.* Torrington also argued that Commerce's interpretation of the statute conforms with its prior practice of the "10/90/10 test" in the *Use and Measurement of Production Costs Under U.S. Antidumping Law* at 9 (Sept. 19, 1995). *Id.*

Commerce states that it has a long standing policy of conducting the sales-below-cost test (know as the "10/90/10 test") on a model-specific basis. *Id.* at 67 (referring to *Policy Bulletin*, 92.3 (Dec. 15, 1992); *Policy Bulletin*, 94.1 (Mar. 25, 1994); SAA at 833); Defendant's Response at 31–32 (referring also to *Mitsubishi Heavy Indus. v. United States*, 22 CIT 541, 563 (1998)). Commerce claims that after calculating COP as per 19 U.S.C. 1677b(b)(3), it tested whether home-market sales of the foreign like product were sold at prices below the COP within an extended period of time and in substantial quantities and whether the prices permitted the recovery of all costs within a reasonable period of time. Defendant's Response at 29. Commerce states that it compared model-specific COPs to the reported home-market prices less any movement charges, discounts, and rebates. *Id.* Commerce argues that the court's interpretation of 19 U.S.C § 1677(16) and 19 U.S.C. § 1677b(b) require a rejection of Asahi's distinction in breadth between "foreign like product" and "subject merchandise and there is no basis for deviation from the precedent. *Id.* at 32, 33 (referring to *NSK, Ltd. v. United States*, 217 F. Supp. 2d 1291, 1299–1300 (CIT 2002) & *Ausimont S.p.A. v. United States*, Slip Op. 02–148 at 18 n. 6, 2002 Ct. Int'l. Trade LEXIS 154 (Dec. 17, 2002)). In accordance with 19 U.S.C. § 1677b(b)(2)(C)(I), Commerce thus says it disregarded Asahi's below-cost sales, as it found 20% or more of Asahi's sales being sold at prices less than COP. *Id.* at 31.

Commerce correctly used the model-specific methodology in disregarding sales below the COP. Pursuant to 19 U.S.C. § 1677b(b)(1) (2001):

> Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—
>
> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) 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 normal value. Whenever such sales are disregarded, normal value 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, the normal value shall be based on the constructed value of the merchandise.

The statute also states that:

> Sales made at prices below the cost of production have been made in substantial quantities if—
>
> (I) the volume of such sales represents 20 percent or more of the volume of sales under consideration for the determination of normal value. . . .

19 U.S.C. § 1677b(b)(2)(C)(I). The applicable regulation concerning calculation of NV if sales are made below cost states:

> In determining normal value, the Secretary may disregard sales of the foreign like product made at prices that are less than the cost of production of that product. However, such sales will be disregarded only if they are made within an extended period of time, in substantial quantities, and are not at prices which permit recovery of costs within a reasonable period of time. (*See* section 773(b) of the Act.) This section clarifies the meaning of the term "extended period of time" as used in the Act.

19 C.F.R. § 351.406 (2001).

Commerce usually undertakes this substantial quantities test on a model specific basis. *Mitsubishi Heavy Indus.*, 22 CIT at 563. Under the statute, if 20% or more of sales of a specific model of the subject merchandise are below cost, Commerce can exclude them. *Id.* Commerce first set out its policy in the *Policy Bulletin*, 92.3 (Dec. 15, 1992), in which it interpreted the then utilized "10/90/10 test,"[11] distinguishing the use of sales on a such or similar basis or model specific basis:

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[11] The *Policy Bulletin* explains the 10/90/10 test by saying that

> We compare the home market sales price of each model to the corresponding cost of production. Then we apply the 10/90/10 test to the home market sales of each model sold in the home market. If we find that less than 10 percent . . . of the sales of a model are made at less than cost, we include all home market sales of that model in the calculation of FMV. If between 10 and 90 percent . . . of home market sales of a specific model are made at less than cost, (assuming below cost sales occur over an extended period of time at less than cost recovery prices) we disregard those sales made at less than cost and use the above cost sales in the price comparisons. If more than 90 percent of home market sales of a model are made at less than cost (with the previous assumption), we disregard all sales of that model.

> If the purpose behind the COP provision of the law is to evaluate the rationality of exporters pricing practices, the such or similar approach is appropriate. The price of any model may be a function, among other things, of the price of other models. It is reasonable to believe that from time to time a producer will price certain models at less than COP, but be profitable overall. As an example, an automobile maker may offer low end cars below COP in order to build owner loyalty. In this case, the pricing decision is rational. Is it fair to look at the price of only one model when the prices are set on a product line basis?
>
> If the purpose of the COP provision is to avoid basing FMV on prices below cost (with certain exceptions), the model specific methodology is appropriate, since it focuses on the prices actually used for FMV. FMV itself is based on a model specific comparison, that of the most similar model. In the price-to-price comparison, the prices of models that are not used in the comparison are irrelevant to the determination of FMV. Similarly, in the cost test, the fact that models not used for comparison are priced above or below cost is irrelevant to determining if the prices to be used for FMV are above or below cost.
>
> We consider that the second method accords more with the departmental practice of calculating model specific FMVs than does the first, and 773(b) directs us to disregard below cost sales in calculating FMV.

The pre-URAA practice of performing the COP test on a model-specific basis was not changed with the enactment of the URAA, as is apparent in the SAA: "[a]s under current practice, the cost test generally will be performed on no wider than a model-specific basis." SAA at 832. By keeping the model-specific methodology for the COP test, Commerce can ensure that respondents do not price their different models in such a way as to be profitable overall and dump goods into the U.S. market simultaneously. Thus, Commerce's decision to use a model-specific methodology is in accordance with law.

Additionally, Asahi's argument that the terms "subject merchandise" and "foreign like product" are used differently in 19 U.S.C. § 1677b(a) and 19 U.S.C. § 1677b(b) and thus lend to a different scope of product treatment, respectively, does not hold water. First, Commerce and Timken point out that 19 U.S.C. § 1677(16) does not describe three separate classes of goods which are subsets of "foreign like product;" instead it provides a hierarchical preference for defining "foreign like product." *See* Defendant's Response at 33. For, in *Ausimont*, this court stated that

> "Foreign like product" means, in descending order of preference, (1) "identical" merchandise, (2) "like" merchandise that is of approximately equal commercial value, component material,

> and use, and is produced by the same person and in the same country, or (3) "like" merchandise that is of the "same general class or kind" and use, and is produced by the same person and in the same country.

Slip Op. 02–148 at 18 n.6 (citing 19 U.S.C. § 1677(16)). Under the statute, Commerce must first look at identical merchandise, which it found here, and use it in its below-cost sales test.

Second, Timken makes a convincing argument that taking a model-specific interpretation of the statute is appropriate because "the substantial quantity test is a sub-part of the cost test itself." Timken points out that in *SKF USA v. United States*, 263 F. 3d 1369, 1382 (Fed. Cir. 2001), the Federal Circuit held that there is a rebuttable presumption that "foreign like product" should be defined consistently, especially where both sections are involved in the same calculation: this is the case with 19 U.S.C. § 1677b(b)(1) and 19 U.S.C. § 1677b(b)(2)(C)(I) which are both used to determine the home market price (NV). *See* Timken's Response at 48. Finally, Commerce accurately points out that finding a difference between the terms "foreign like product" and "subject merchandise" is contrary to law.

The court agrees with Commerce's reasoning that using the congruent definition of these terms in this context provides for the most accurate dumping margins to be calculated and prevents the calculation of NV based on prices below cost. By using the most specific classification uniformly through the process, Commerce can examine the pricing of a specific type of merchandise and disallow price adjustments among a companies' products. For the stated reasons, the court upholds Commerce's application of the model-specific below cost test to Asahi.

D
Isuzu Is Not Allowed to Rely On Proprietary Information To Support Its Corroboration Argument, After It Failed to Get Timely APO Access In the Underlying Review

Commerce argues that Isuzu has attempted to rely on proprietary information that it did not have access to during the administrative review without exhausting its administrative remedies. Defendant's Response at 36. Commerce states that Isuzu made an untimely request for an administrative protective order ("APO") which Commerce denied under 19 C.F.R. § 351.305(b)(3)[12]; Isuzu did not ap-

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[12] Section 351.305(b)(3) states

> To minimize the disruption caused by late applications, an application should be filed before the first questionnaire response has been submitted. Where justified, however, applications may be filed up to the date on which the case briefs are due, but any applicant filing after the first questionnaire response is submitted will be liable for costs associated with the additional production and service of business proprietary information already

peal. Thus, Isuzu's corroboration arguments regarding the use of adverse facts available were supported by public, non-APO material. Commerce states that, at the commencement of this litigation, Isuzu gained access to APO material through a judicial protective order ("JPO") pursuant to USCIT Rule 71(c). *Id.* at 40. Commerce thus argues that it has not had the opportunity to consider Isuzu's arguments which it has now supported by proprietary information obtained under the JPO. *Id.* at 37. Commerce argues that the doctrine of exhaustion requires Isuzu to present claims to the administrative agency before raising them with the court. *See* 28 U.S.C. § 2637(d); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998). None of the exceptions to the doctrine, argues Commerce, applies. *See Rhone Poulenc, S.A. v. United States*, 583 F. Supp. 607, 610 (CIT 1984). Because of Isuzu's failure to make a timely APO application and to appeal the APO denial, it cannot use new information to circumvent the administrative process and bolster its arguments before the court. Timken agrees with the Government's argument.

Isuzu argues that Commerce's argument confuses access to proprietary information and a failure to exhaust administrative remedies. It claims that it "presented the same fundamental corroboration argument to the Department in the administrative review as is now before the Court. Simply because Isuzu did not have access to proprietary information, to include it in its argument does not change the nature of the argument." Reply Brief of Plaintiff Isuzu Motors, Ltd. ("Isuzu's Reply") at 17. Isuzu argues that USCIT Rule 71(c) (2001) contemplates the present scenario in its Form 17 certification, part 3, which states:

> I was not . . . subject to an administrative protective order in the administrative proceeding which gives rise to this action. All parties to this action and interested parties who are entitled to service of this Certification pursuant to Rules 5 and 71 (c)(5) of the United States Court of International Trade are listed below:
>
> . . .
>
> Each of these parties or interested parties has been contacted; none has objected to mu access to proprietary information in this action subject to the Appendix on Access to Business Proprietary Information Pursuant to Rule 71(c) to the Rules of the Court of International Trade.

Thus, Isuzu claims that if Commerce did not find it appropriate for Isuzu's counsel to present arguments using proprietary information,

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on the record. Parties have five days to serve their business proprietary information already on the record to applicants authorized to receive such information after such information has been placed on the record.

it should not have consented to Isuzu's JPO request and thus have effectively waived the exhaustion argument. Isuzu's Reply at 18.

Under these circumstances, Isuzu may not use information to which it did not have access pursuant to the APO and subsequently received through the JPO to support its arguments. Isuzu's conduct here appears to have been an intentional decision on its part. It erroneously argues that Commerce by consenting to the JPO waived its exhaustion argument. A waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Former Emples. of Quality Fabricating, Inc. v. United States*, Slip Op. 04–48 at 39, 2004 Ct. Int'l Trade LEXIS 48 (May 11, 2004). Counsel for the U.S. Government during the July 7, 2004, oral argument denied the Government had intended to waive any rights in granting the JPO access.[13] The JPO is designed to give parties access to information, but access to information does mean that the information is useable for all purposes. Isuzu may not rely on proprietary information to support its corroboration argument that it did not have access to pursuant to the APO without first exhausting its administrative remedies.

E
Commerce's Determination to Base its AFA Rate On the Highest Calculated Rate and Corroborate Based on Contemporaneous Sales Information, Because Isuzu was Not Cooperative During the Review, Is Supported by Substantial Evidence and Is In Accordance With Law

Isuzu, as an original equipment manufacturer (OEM) reseller of BBs to the U.S. market, disputes Commerce's imposition of a 73.55% AFA rate. Isuzu argues that the rate chosen, the highest rate for a manufacturer based on partial best information available ("BIA") from the original investigation and its corroboration by examining transaction-specific margins of a cooperating Japanese manufacturer in the present review, is erroneous. Issues and Decision Memorandum at 5. Isuzu argues that it is insufficient for Commerce to say it "has corroborated the adverse factual interferences it uses or "cherry pick" select sales arbitrarily and call this corroboration." Plaintiff Isuzu's Motion for Judgment upon the Agency Record ("Isuzu's Motion") at 13. Relying on *F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032 (Fed. Cir. 2000) and *Am. Silicon Techs. v. United States*, 240 F. Supp. 2d 1306, 1312

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[13] Counsel elaborated, saying that the granting of JPO access was not a question of waiver because the Government did not object to Isuzu's JPO access and the court's rules allow it. Rather, counsel stated that "because of the way [Isuzu] did not participate in this review and . . . played the system to only participate once they found out they weren't happy with the rate they should not be allowed to rely upon that information to make arguments they did not make during the administrative proceedings."

(CIT 2002), Isuzu argues that the AFA rate chosen is not a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." Issues and Decision Memorandum at 5; *see* Isuzu's Motion at 11–12.

Isuzu states that because there are Japanese BBs manufacturers, OEM resellers, and trading companies involved in this review, Commerce should recognize the distinctions between them in choosing an AFA rate. Issues and Decision Memorandum at 5; Isuzu's Reply at 19–20. On the one hand, the margins calculated for OEM resellers, Isuzu argues, have typically been among the lowest with rate ranging from .04% to 2.33% and as high as 3.84%; the only rate calculated for Isuzu was .92%. Isuzu's Reply at 19–20. On the other hand, margins for cooperating Japanese BBs manufacturers have ranged from .01% to 48.69%. Furthermore, Isuzu claims that the 73.55% partial-BIA rate was derived from a section of law that has been amended by the URAA because it was creating punitive margins and thus discredits its use in calculating the AFA rate. Issues and Decision Memorandum at 5; Isuzu's Motion at 15. Finally, Isuzu argues that the imposition of an AFA rate using data from twelve year old transactions reduces significantly its probative value for current transactions. Issues and Decision Memorandum at 5; Isuzu's Motion at 16–17. Isuzu thus suggests that Commerce impose a margin rate of 48.69% which was the margin calculated for Nachi in the original investigation.[14] *Id.* at 27.

Commerce argues that, because Isuzu chose not to participate in this review, though having been notified that this decision would result in an imposition of an AFA rate, it was justified in applying a total AFA rate based on the highest rate calculated for any company in any segment of this proceeding. Issues and Decision Memorandum at 6 (referring to Commerce's Memorandum to File (August 31, 2001)). Commerce justifies the use of the 73.55% rate by showing that it derived it during the preliminary stage of the Original Investigation using the petition rate for BIA to analyze specific home-market sales to unrelated parties. *Preliminary Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Taper Roller Bearings) and Parts Thereof from Japan*, 53 Fed. Reg. 45,343, 45,346 (Nov. 9, 1988). The BIA rate applied in the final determination of the Original Investigation was as a result of Koyo's, a BBs manufacturer, submission of a new response just prior to verification. Original Investigation, 54 Fed. Reg. at 19,102; *Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other*

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[14] Commerce did not choose the margin calculated for Nachi in the original investigation because it chose the highest calculated rate for any company in any portion of this antidumping investigation and the subsequent reviews: that of Koyo Seiki in the Original Investigation. Nachi's current transaction-specific margins was used purely to corroborate the AFA rate.

Than Taper Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 18,992, 19,033 (May 3, 1989).

Commerce argues that the "selection of the highest rate calculated for any company in any segment of this proceeding as an adverse facts available rate is consistent with out past practice." Issues and Decision Memorandum at 6 (referring to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 65 Fed. Reg. 49,219 (Aug. 11, 2000) ("*AFBs 10*")). Commerce states that nothing on the record limits Commerce's ability to choose dumping margins from any particular types of respondents. Commerce claims to have corroborated the AFA rate with current transaction-specific margins from Nachi Japan, a BBs manufacturer, which it also claims is consistent with past practice. *Id.* at 7. In its review, Commerce found a number of sales with dumping margins at or above 73.55% which were substantial whether considering the number of transactions, value of transactions, or quantity of transactions. *Id.* Thus, the AFA rate selected for Isuzu is relevant, continues to have probative value, and is not unduly harsh or punitive. *Id.*

The Defendant-Intervenor, Timken, argues that, as Isuzu was an uncooperative respondent, Commerce's use of an adverse inference and the 73.55% AFA rate was appropriate. Timken argues that, while 19 U.S.C. § 1677e(c) discusses corroboration, it is not absolute because the statute states "to the extent practicable." Timken's Response at 77. Timken also rebuts Isuzu's reliance on *De Cecco* and *Am. Silicon Techs.*; in those cases, although Commerce imposed an AFA rate, the respondents had in fact responded to Commerce's questionnaires, but had done so in an insufficient manner. *Id.* at 78–80. Here, Isuzu refused to respond to the questionnaire. Timken argues that Commerce acceptably calculated the rate derived from Koyo's margin in the original investigation; its use of margins from 1989 are permitted by statute, *see Reiner Brach GmbH & Co. KG v. United States*, 206 F. Supp. 2d 1323, 1339 (CIT 2002); and that Commerce utilized margins from producers for calculating the margin is within Commerce's discretion for an uncooperative respondent. *Id.* at 81–83. Finally, Timken claims that the margin Commerce chose was neither derived through "cherry picked" claims nor was unduly punitive: the responses of "Nachi and Koyo are more or less 'probative' of the potential current margin for Isuzu . . . as the record contains no evidence regarding Isuzu's current sales." *Id.* at 83.

Commerce's statutory mandate is to determine dumping margins as accurately as possible. *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 178 F. Supp. 2d 1305, 1317 (CIT 2001). Commerce must thus gather accurate data from respondents, having given respondents a reasonable opportunity to participate in the review. *See*

Bowe-Passat v. United States, 17 CIT 335, 339 (1993). Ultimately, respondents have the responsibility of creating an adequate record. *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936 (1992). Commerce, however, has the statutory authority to use facts otherwise available, subject to 19 U.S.C. § 1677m(c)(1)[15], (d)[16], and (e)[17] if

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this title,

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[15] 19 U.S.C. § 1677m(c)(1) states that

If an interested party, promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

[16] Pursuant to 19 U.S.C. § 1677m(d)

If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits,

then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

[17] Pursuant to 19 U.S.C. § 1677m(e)

In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.

> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
>
> (C) significantly impedes a proceeding under this title, or
>
> (D) provides such information but the information cannot be verified as provided in section 782(I),
>
> the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

19 U.S.C. § 1677e(a) (2001); *Reiner Brach*, 206 F. Supp. 2d at 1329–30. If Commerce acts in accordance with its statutory requirements and uses total facts available, but finds that

> an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among facts otherwise available. Such adverse inference may include reliance on information derived from —
>
> (1) the petition;
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.

19 U.S.C. § 1677e(b); *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). When Commerce applies an adverse inference, it "needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation." *Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302, 1313–14 (CIT 1999). If Commerce adequately supports these two findings, the court will find that Commerce's use of an adverse inference is supported by substantial evidence. *Id*.

When a respondent fails to respond to Commerce's requests and the information it requested is material to the investigation, this court has found such behavior to be unreasonable and the use of AFA appropriate. *See Branco Peres Citrus, S.A. v. United States*, 173 F. Supp. 2d 1363, 1374–75 (CIT 2001); *Am. Silicon Techs.*, 240 F. Supp. 2d at 1311. In the case of uncooperative respondents, it is within

Commerce's discretion to choose the secondary bases on which it will rely to support its use of adverse inferences;

> [p]articularly in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin. Commerce's discretion in these matters, however, is not unbounded.

De Cecco, 216 F.3d at 1032. Section 1677e(b) is geared to promote cooperation by respondents, but not impose "punitive, aberrational, or uncorroborated" margins; this is evidenced in the 19 U.S.C. § 1677e(c) corroboration requirement which intends the AFA rate "to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *De Cecco*, 216 F.3d at 1032. Thus, the margin selected by Commerce must have some relation to the respondent's dumping margin. At issue in this case is whether Commerce's levying of the particular AFA rate of 73.55% is in accordance with the law because "[t]here is no dispute that Isuzu failed to respond to the Department's questionnaire in the administrative review." Isuzu's Reply at 4. Isuzu does not contest the use of AFA but instead contests the manner in which it was applied and the rate that was chosen.

The court upholds Commerce's imposition of a 73.55% AFA rate on Isuzu. Pursuant to 19 U.S.C. § 1677e(b) and 19 C.F.R § 351.308(c),[18] Commerce may rely on secondary information[19] from the petition, a final determination in an investigation, previous reviews, and any other information placed on the record to draw its adverse inference.

Here, Commerce chose, consistent with the statute, Koyo's margin which was a part of the final determination from the Original Investigation. While Isuzu argues that Commerce should have taken into account that Isuzu is an OEM reseller and Koyo is a BBs manufacturer in determining the dumping margin, nothing in the statute or

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[18] As per 19 C.F.R. § 351.308(c),

1) Secondary information, such as information derived from:

(I) The petition;

(ii) A final determination in a countervailing duty investigation or an antidumping investigation;

(iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or

(2) Any other information placed on the record.

[19] "Secondary information" is defined in the SAA at 870 as "information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise."

the applicable regulation limits Commerce's discretion to choose a surrogate rate based on the type of respondent. Furthermore, as Isuzu refused to participate in the review, it cannot be presumed that Isuzu was not conducting business as a BBs producer or trader. This court has repeatedly held that Commerce's special expertise makes it the "master" of antidumping law, entitling its decisions to great deference from the courts. *Heveafil Sdn. Bhd. v. United States*, 58 Fed. Appx. 843, 847 (Fed. Cir. 2003); *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 929 (Fed. Cir. 1984). This court thus defers to Commerce's choice of Koyo's margin as a surrogate rate for Isuzu.

Upon determining that it will use secondary information to draw an adverse inference, Commerce is faced with a corroboration requirement as per 19 U.S.C. § 1677e(c) and the applicable regulation 19 C.F.R. § 351.308(d):

> Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal. Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value. The fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.

Commerce states in the current review that it corroborated its choice of Koyo's rate from the Original Investigation with that of current transaction-specific margins for Nachi Japan. Once again, neither the statute nor the regulation prevents Commerce from using Nachi Japan's margin for this purpose. Furthermore, as Timken points out, pursuant to the "to extent practicable" language in 19 U.S.C. § 1677e(c) and "[t]he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question" language in 19 C.F.R. § 351.308(d), the corroboration requirement itself is not mandatory when not feasible. In this case, Commerce had no current information for Isuzu because Isuzu refused to participate in the review and it used Nachi's rate consistent with its past practice of comparing margins on individual sales by respondents. *See* Issues and Decision Memorandum at 7. Because of Isuzu's noncooperation, Commerce has leeway in calculating the applicable AFA rate and Isuzu cannot pick and choose which rate it feels would be more appropriate in the circumstance.

F
Commerce's Determination, Challenged by MPB, to Accept NTN's Reported Cost Data is Supported by Substantial Evidence

MPB argues that Commerce should verify NTN's reported cost data before accepting it for the final results, or alternatively, that Commerce should make the appropriate adjustments on a facts available basis. Issues and Decision Memorandum at 67. MPB claims that NTN's cost data varies starkly from year to year: "changes in costs from the 11^{th} to the 12^{th} review ranged from a decrease of more than [a percentage] to an increase of over [a percentage]; changes in constructed values ranged from a decrease of more than [a percentage] to an increase of over [a percentage]." MPB Corporation's Rule 56.2 Motion for Judgment on the Agency Record ("MPB's Motion") at 6. MPB also argues that while indirect expenses can vary without any apparent justification, costs of labor and materials should not vary so much unless there are changes in technology or some other condition. Issues and Decision Memorandum at 67. MPB also argues that NTN just referred to Attachment D–1 of its section D questionnaire response with no further explanation in responding to MPB's pre-preliminary comments. *Id.* MPB says that, while NTN responded to Commerce's questionnaire by explaining its variance system, NTN did not explain the "radical increases and decreases reported." MPB's Motion at 9. Thus, MPB argues, while Commerce correctly requested further information specifically about costs from NTN through a supplemental questionnaire at MPB's behest, Commerce's determination to accept NTN's reported costs was not supported by substantial evidence. MPB says that this issue should be remanded to Commerce for further investigation and/or the use of facts available.

NTN argues that it reported its cost data accurately and does not deserve an imposition of facts available. Issues and Decision Memorandum at 67. NTN claims that it was not asked about the cost variances for the 1999–2000 and 2000–2001 administrative reviews and that MPB cannot claim it was unresponsive when Commerce never requested the information. *Id.* NTN also states that MPB speculates on the causes of the COP variations without an understanding of NTN's cost calculation methods. *Id.* at 68. NTN states that it reviews its standard costs every half fiscal period and actual cost is calculated by multiplying the standard cost by the variance ration even in situations of non-production. *Id.* at 67–68. NTN argues that Commerce has verified and found NTN's accounting method to be accurate in prior reviews. *Id.* at 68.

Commerce states that NTN responded adequately to its supplemental questionnaire regarding its change in costs between the 11^{th} and 12^{th} administrative reviews. It responds to MPB that NTN's reference to Attachment D–1 was an attachment to its January 3, 2002, supplemental response and not its Section D questionnaire. *Id*. Commerce argues that though it did not verify NTN's cost information, its submitted data was subject to verification. Commerce thus states that it had no reason to reject NTN's explanation of its costs or employ facts available. *Id*.

Commerce had discretion to accept NTN's reported cost data in calculating its dumping margin in the Preliminary Results and Final Results of this review. On August 31, 2001, NTN submitted questionnaire responses with information concerning COP and constructed value ("CV"). On November 21, 2001, MPB submitted its analysis of NTN's Section D questionnaire, drawing attention to NTN's decrease in costs between the current and previous reviews. On November 29, 2001, Commerce sent NTN a supplemental questionnaire to which it responded on January 3, 2002. MPB filed a letter again citing that NTN's responses were deficient and NTN filed a rebuttal letter on February 14, 2002. MPB and NTN again filed letters with Commerce regarding NTN's cost data on March 14 and 26, 2002, respectively.

Commerce gathered sufficient information to conclude that NTN explained adequately the variances in its costs. In its Section D questionnaire, NTN explained its general cost accounting methodology as well as how changes in its plants and processes affected its reported costs. Defendant's Response at 59. Commerce also notes that "[i]n response to [its] supplemental questionnaire regarding how NTN's cost variances resulted in changes in reported costs, both generally and for specifically requested product categories, NTN provided a detailed explanation of its variance calculation methodology for the specific product categories." *Id*. Commerce claims that it was able to get this information through NTN's reference to its Attachment D–1 to its supplemental questionnaire response. Commerce thus did not have good cause to verify NTN's cost data or to apply facts available. *Id*. at 63.

If appropriate, Commerce has discretion not to verify the information it receives. *See*, *e.g.*, *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1383 (Fed. Cir. 2001). Commerce requested information from NTN in a supplemental questionnaire and NTN provided answers to the questions it was asked, which Commerce deemed sufficient. Commerce here has articulated a "rational connection between the facts found and the choice made." *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). Therefore, Commerce's decision to accept NTN's reported cost data is supported by substantial evidence.

G
With Regards to NSK Europe, Commerce Has Properly Interpreted "Foreign Like Product" for Calculating Constructed Value

NSK Europe argued that Commerce erroneously calculated CV-profit because it should have interpreted and applied the term "foreign like product" in a consistent fashion in the CV-profit and price contexts. NSK Europe's Motion at 14.[20] Commerce and Timken point out that *FAG Kugelfisher* affirmed Commerce's methodology with respect to its differential use of the term "foreign like product" for calculating CV profit.

In *FAG Kugelfischer*, the Federal Circuit upheld Commerce's application of different subparts of 19 U.S.C. § 1677(16)[21] to define "foreign like product" in the same administrative proceeding. 332 F. 3d at 1373. The Federal Circuit stated:

> Section 1677(16) . . . offers three alternative definitions for foreign like product, which increase in the scope of products that may be included. See 19 U.S.C. § 1677(16). The first available category of merchandise, with which differing determinations

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[20] NSK Europe, however, concedes in its Reply that a Federal Circuit case cited by both the Defendant and Timken, *FAG Kugelfischer George Schafer v. United States*, 332 F.3d 1370 (Fed. Cir. 2003), is applicable to this case as it pertains to the issue of "foreign like product" and provides adverse precedent to its position. NSK Europe's Reply at 7. NSK Europe further states that it had petitioned the Federal Circuit for rehearing, but "if the petitions for rehearing are denied and the decision in *FAG Kugelfischer* upheld, NSK Europe accepts the Federal Circuit's ruling on this matter." NSK Europe's Reply at 7. During the July 7, 2004, oral argument, counsel for NSK Europe stated it was "withdrawing [the] particular claim based upon . . . *FAG Kugelfischer*."

[21] Pursuant to 19 U.S.C. § 1677(16):

> Foreign like product. The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of subtitle B of this title [19 USCS §§ 1673–1671h] can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

> may be satisfactorily made, is to be applied. Id. There is no restriction that Commerce use just one subsection per proceeding. Id. Accordingly, we believe that Commerce reasonably explained that the determinations for the variables at issue require different sets of foreign like product data. The bearing market, with its wide disparity in products, necessitates that direct price comparisons be done on a model-by-model basis. Therefore, the use of price comparisons requires the identical model and product family data of sections 1677(16)(A) and (B). And CV profit may be based on a broader scope of products because use of aggregate data, as described in section 1677(16)(C), results in a practical measure of profit that can be applied consistently and with administrative ease over the range of included products.

Id. In this review, as in *FAG Kugelfischer*, Commerce defined foreign like product for price purposes according to 19 U.S.C. § 1677(16)(A) & (B) and "used data from sales of identical or the same family of products." Defendant's Response at 65. Commerce then applied a broader definition of foreign like product for CV purposes under 19 U.S.C. § 1677(16)(C) which includes merchandise "of the same general class or kind as the subject merchandise." *Id*. Commerce states that it applied a broader definition because Congress expressed that 19 U.S.C. § 1677b(e)(2)(A) was a preferred methodology for calculating CV. *Id*.

NSK Europe did not distinguish this case from *FAG Kugelfischer* in a way that would justify an alternate result.[22] This court sustains Commerce's methodology as reasonable and not overbroad. *See FAG Kugelfisher*, 332 F.3d at 1374.

H
Commerce's Use of AFA in Calculating NTN's Home Market and Freight Expenses Is Supported by Substantial Evidence and Is in Accordance with Law

MPB argues that Commerce correctly applied AFA to NTN's reported home market and U.S. inland freight expenses. MPB states that NTN's sales value method is not the most accurate because insurance, which is paid on a value basis, is an expense reported separately and, furthermore, there is no evidence that expensive bearings are more costly to ship than cheaper ones. Issues and Decision Memorandum at 74. MPB claims that NTN was a noncooperative respondent because it refused to comply with Commerce's request to report the weight of the BBs which is "a logical basis for allocating

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[22] The Federal Circuit denied its petition for rehearing. *FAG Kugelfisher*, 332 F.3d 1370, *reh'g denied*, 2003 U.S. App. LEXIS 19511 (2003) and, as stated above, counsel for NSK Europe withdrew the claim.

freight cost for products such as AFBs and is probably more reasonable than sales value." *Id.* Thus, MPB argues that NTN should not benefit from its noncooperation and that Commerce should impose an AFA rate.

NTN states that it did report its freight expenses as per Commerce's requirements and to the best of its ability. *Id.*; *see* NTN's Rule 56.2 Motion and Memorandum for Judgment on the Agency Record Submitted on Behalf on Plaintiffs, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation ("NTN's Motion") at 6. NTN says that it submitted evidence on the record showing how its freight expenses are calculated and that, because it does not maintain data on weight and its weight information is not computerized per bearing, it was not able to calculate freight on a weight basis. Issues and Decision Memorandum at 74; NTN's Motion at 7. Furthermore, NTN claims that its invoices show that freight expenses are incurred on the basis of many factors other than weight, "because multiple variable are used, which are not uniform for each sale"; it calculates its home market freight expenses "based on sales price and allocates its U.S. freight expenses based on value" because that is the only factor common to all shipments. Issues and Decision Memorandum 74–75; NTN's Motion at 7. Arguing that larger BBs are more expensive than smaller ones, NTN states that, contrary to MPB's assertion, there can be a correlation between price and weight. Issues and Decision Memorandum at 75. NTN argues that Commerce accepted this allocation methodology in all previous reviews other than the 1999–2000 review. *Id.* As a result, NTN argues that Commerce should accept its reported allocation of home market expenses and not apply AFA.

Commerce states that, pursuant to 19 C.F.R. § 351.401 and 19 C.F.R. § 351.402, NTN failed to justify its use of sales value as an allocation methodology. In addition to not being able to justify its allocation methodology, Commerce had asked NTN to report per-unit weight for its BBs in the original and supplemental questionnaires which Commerce had asked it to include in its home-market and U.S. sales database. NTN, Commerce argues, refused to provide this information again claiming that it did not use weight to calculate its freight expenses though it offers this data in its product brochures.[23] *Id.* at 77–78.

Because NTN withheld information from Commerce twice (in the original and supplemental questionnaires) and failed to act to the best of its ability to explain fully how its allocation methodology based on sales value was not distortive, Commerce deemed appropri-

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[23] Commerce notes that "the size of the sales databases and number of models prevents us from incorporating the weights from NTN's product brochure in the sales database." Issues and Decision Memorandum at 78.

ate the use of facts available and an adverse inference pursuant to 19 U.S.C. § 1677e. *Id.* at 78. Commerce also found that because NTN had incurred freight costs, replacing all its home market freight expenses would be inappropriate; Commerce instead calculated NTN's adverse rate based on record information under 19 U.S.C. § 1677e(b)(4) and 19 C.F.R. § 351.308(c)(2). *Id.* With respect to freight on NTN's U.S. sales, Commerce "assumed that inland-freight expenses that NTN incurred during the POR were incurred for subject merchandise and allocated the total freight expense to those sales." *Id.* at 79.

Timken supports Commerce's imposition of AFA to NTN's home market and U.S. freight expenses because NTN used allocation methodology based on sales value. Timken argues that Commerce was correct to state that allocation by weight is less distortive. Timken's Response at 59. Furthermore, argues Timken,

> there is no reason in practical experience to believe that freight expense correlates to value. Allocation by value results in under-allocation of freight costs and lower-price sales. U.S. sales at dumped prices (vs. non-dumped U.S. sales) will be allocated lower freight costs, thus understating margins. Conversely, in the home market, higher-priced sales will be allocated higher freight adjustments, reducing normal value.

Timken's Response at 60. Timken also argues that Commerce correctly used its discretion to apply partial AFA because of NTN's lack of cooperation. Moreover, even though Commerce had accepted NTN's methodology in the past, it was not bound to adhere to it. *Id.* at 66 (citing *NSK Ltd. v. United States*, 19 CIT 1013, 1027 (1995)).

Commerce justifiably rejected NTN's allocation methodology and applied AFA to the calculation of NTN's home market and U.S. freight expenses. First, regarding the allocation methodology, pursuant to 19 U.S. § 1677a(c) (2001)[24], Commerce is directed to adjust the EP or CEP in certain circumstances. Under the applicable regu-

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[24] Under 19 U.S.C. § 1677a(c), Adjustments for export price and constructed export price:

The price used to establish export price and constructed export price shall be—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and

(C) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy, and

(2) reduced by—

lation, 19 C.F.R. § 351.401(b)(1) (2001), the burden for demonstrating the "amount and nature of the particular adjustment" falls on the "interested party that is in possession of the relevant information." Under § 19 C.F.R. § 351.401(g)(1), Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions." The party seeking Commerce's approval of its allocation and adjustment methodology must "demonstrate to [Commerce's] satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2). To reach its conclusion, Commerce must consider records kept by the interested party and general accounting standards used in that country and industry. 19 C.F.R. § 351.401(g)(3). Thus, based on the regulation, it is within Commerce's discretion to allow or disallow the allocations and adjustments requested. *NTN Corp.*, 306 F. Supp. 2d at 1328.

Commerce acted within its discretion to reject NTN's allocation methodology based on sales value instead of by weight. In this review, Commerce requested information on NTN's allocation methodology even though it had not done so prior to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 Fed. Reg. 36,551 (July 12, 2001) ("*AFBs 11*") and had previously accepted the methodology.[25] Issues and Decision Memorandum at 77; *see* Defendant's Response at 77. Commerce acknowledges this shift and it "has discretion to change its methodology, so long as its decision is reasonably supported by the record." *NTN Corp.*, 306 F. Supp. 2d at 1328.

The record here supports Commerce's position that weight is a more appropriate basis for allocation. Weight is not the *only basis* upon which NTN incurs freight expenses, and Commerce found that the evidence on the record *does not show that sales price is a factor*

(A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States, and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(C).

[25] Although NTN argues that Commerce had accepted its allocation methodology in the past, in fact NTN had refused to supply information concerning its allocation methodology in the previous review, *AFBs 11*, and Commerce had applied an adverse inference. *See* Issues and Decision Memorandum at 77.

on which NTN incurs freight expenses. Issues and Decision Memorandum at 76 (emphasis added); *see* Defendant's Response at 74. Commerce found that allocating freight costs based on weight may include distortions; however, the methodology is less distortive than one that allocates costs on a basis which, based on the record evidence, no freight expenses are incurred. Issues and Decision Memorandum at 76. Commerce argues that when it asked NTN in a supplemental questionnaire to explain how its methodology was not distortive, it gave insufficient answers arguing that sales value was common to all shipments, freight expense was not allocated by weight, and that its records do not allocate expenses based on weight. *Id.* (referring to NTN's January 3, 2002, supplemental questionnaire response at pages B–1 and C–2). Commerce found the first argument could be used for weight, while the second was illogical, and the third argument was false as NTN's product brochure lists weight for all of its BBs. *Id.* at 76–77. Commerce further found suspect NTN's argument that larger BBs are more costly than smaller ones and thus value-based allocation is just as reasonable as one based on weight. *Id.* at 77. Based on an assessment of the record, Commerce arrived at a reasonable conclusion. Thus, Commerce's refusal to accept NTN's allocation based on sales value rather than weight is supported by substantial evidence.

Commerce also was within its discretion to impost partial AFA to NTN's home market and U.S. freight expenses. As explained above, pursuant to 19 U.S.C. § 1677e(a)(1)–(2), Commerce can, among other situations, employ "facts available" in an antidumping proceeding if "necessary information in not available on the record" or if an interested party "withholds" or "fails to provide" information requested. If Commerce finds that the party has "failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). To draw this adverse inference, the statute and applicable regulation grant Commerce the ability to rely on the petition, a final determination in the current investigation, any previous review or determination, or "any other information placed on the record." 19 U.S.C. § 1677e(b)(1)–(4); 19 C.F.R. § 351.308(c).

In this review, Commerce presented NTN with an opportunity to explain why its allocation methodology was not distortive, but NTN did not submit adequate responses to the original or supplemental questionnaires. Commerce requested in both questionnaires that NTN provide per-unit weights for its BBs, including the data in its home-market and U.S. sales database, but NTN apparently did not comply and instead replied that it did not use weight in the calculation of its freight expenses. Commerce had the authority to use facts available here because it did not have the requisite information from

NTN to conduct this review. And, it rightly used an adverse inference after two specific requests for information for which NTN did not provide useable data. While it was within Commerce's discretion to use any information to support its adverse inference, Commerce chose information that NTN itself had reported. The AFA freight rates with respect to home market freight expenses Commerce chose are most appropriate because it based the rates on the figures NTN submitted from its cost centers in its questionnaire responses. Issues and Decision Memorandum at 78–79. Also, for freight on NTN's U.S. sales, Commerce choice of data was reasonable because it incorporated the data NTN reported during the review along with an adverse inference. *Id.* at 79. Commerce has calculated the antidumping margin in the most accurate way possible. *See Rubberflex DSN. BHD. v. United States*, 59 F. Supp. 2d 1338, 1346 (CIT 1999). Therefore, Commerce's use of AFA in calculating NTN's home market and U.S. freight expenses is supported by substantial evidence and is in accordance with law.

I
The Court Grants Commerce a Remand To Correct Its Clerical Errors Concerning the Treatment of NTN's Freight and Warehouse Expenses

NTN argues that there were clerical errors in the amended final results computer program that affected the accuracy of the NTN's dumping margin. NTN's Motion at 15. The calculation apparently failed to exclude EP sales from the calculation of U.S. freight and warehouse expenses. *Id.* Commerce concedes that it should not have included EP sales in the calculation of NTN's U.S. freight and warehouse expenses. Defendant's Response at 87. It thus requests a remand to correct the clerical errors.

Having reviewed the comments by the parties on this issue, the court remands this action to Commerce to rectify the clerical errors with regards to its inclusion of EP sales in its calculation of NTN's freight and warehouse expenses.

VI
CONCLUSION

For the foregoing reasons Commerce's Review in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Administrative Reviews*, 67 Fed. Reg. 55,780 (Aug. 30, 2002) is remanded in part and sustained in part. Commerce is directed to conform its determination to the instructions in this opinion.

Slip Op. 04–118

FORMER EMPLOYEES OF TYCO ELECTRONICS, FIBER OPTICS DIVISION, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, Defendant.

Court No. 02–00152

[Plaintiffs' Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act is granted with certain adjustments.]

Dated: September 16, 2004

Williams Mullen, P.C., (*Jimmie V. Reyna, Francisco J. Orellana*) Washington, D.C. for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Stephen Carl Tosini*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Jayant Reddy*, Office of the Solicitor, United States Department of Labor, of Counsel, for Defendant.

OPINION

This matter comes before the Court on Plaintiffs', Former Employees of Tyco Electronics, Fiber Optics Division, Glen Rock, Pennsylvania, ("Former Employees"), application for attorneys fees and other expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000). The EAJA states that "[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . , incurred by that party in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Former Employees' application is made in connection with this Court's final decision in *Former Employees of Tyco Elecs. v. United States*, No. 02–00152, 2004 Ct. Int'l Trade LEXIS 33 (Ct. Int'l Trade April 14, 2004) ("*Tyco III*"), which sustained the United States Department of Labor's certification of Plaintiffs as eligible to apply for North American Free Trade Agreement-Transitional Adjustment Assistance ("NAFTA-TAA"). Because the Court finds that Labor's position during this litigation was not substantially justified, Plaintiffs' application for fees and expenses under the EAJA is granted with certain modifications discussed below.

BACKGROUND

Although the detailed background facts and procedural history of this action have been articulated by the Court in its earlier opinions, *see Tyco III*, 2004 Ct. Int'l Trade LEXIS 33, at *2–*7; *Former Employees of Tyco Elecs. v. United States Dep't of Labor*, 264 F. Supp. 2d

1322, 1323–26 (Ct. Int'l Trade 2003) ("*Tyco II*") (denying Plaintiffs' second motion for judgment on the agency record and remanding the case to Defendant); *Former Employees of Tyco Elecs. v. United States Dep't of Labor*, 259 F. Supp. 2d 1246, 1248 (Ct. Int'l Trade 2003) ("*Tyco I*") (granting Defendant's second motion to file remand results of out time, denying Plaintiffs' motion for certification, and granting Plaintiff's request for fees pursuant to USCIT R.16(f)), it is necessary for the Court to review the development of this action again so that it may determine whether or not the Government's position was substantially justified under the EAJA. *See Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988) ("Substantial justification is to be decided case-by-case on the basis of the record . . . and is reached by examination of the government's position and conduct through the EAJA 'prism.' " (internal quotation marks and citations omitted)).

A. Plaintiffs' Petition for NAFTA-TAA Benefits.

In July 2001, Former Employees sought certification for NAFTA-TAA benefits pursuant to 19 U.S.C. § 2331[1], based on their belief that their job loss was a result of an increase in imports from Mexico and a result of a shift in production of fiber optic components to Mexico. Pub. Admin. R. at 2, 53. The Pennsylvania Department of Labor and Industry initiated a preliminary investigation and denied the Former Employees' petition based on insufficient import infor-

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[1] Section 2331(a)(1) provides:

> A group of workers . . . shall be certified as eligible to apply for adjustment assistance under this subchapter . . . if [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—
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> (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) (2000).

The Court notes that Congress repealed 19 U.S.C. § 2331, on August 6, 2002, folding the NAFTA-TAA program into a new trade adjustment assistance scheme under the newly-revised version of the Trade Act of 1974 renamed the Trade Act of 2002. *See* Pub. L. No. 107–210, § 123(a), 116 Stat. 933, 944 (2002). However, Plaintiffs' petition antecedes the November 4, 2002, effective date of the revised statute; thus, they cannot benefit from the terms of the revised statute. *See id.* at § 151, 116 Stat. 953–54.

mation regarding like products and Tyco Electronics' initial survey response. Conf. Admin. R. at 12–14.

B. Administrative Proceedings at the Department of Labor.

1. Labor's Initial Investigation.

Labor initiated an investigation of the Former Employee's NAFTA-TAA certification eligibility petition in September 2001. *Investigations Regarding Certifications of Eligibility to Apply for NAFTA Transitional Adjustment Assistance*, 66 Fed. Reg. 48,708 (Sept. 21, 2001). Labor's initial investigation consisted of one form letter requesting information about Former Employees' job separation from company officials at Tyco Electronics. Conf. Admin. R. at 33–34. Labor denied the Former Employees' NAFTA-TAA petition on the grounds that imports from Mexico did not contribute importantly to the Former Employees' separation and there was no shift in production to Mexico. *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 66 Fed. Reg. 53,250, 53,252 (Oct. 19, 2001). Based on Tyco Electronics' response to the form letter, Labor determined that the predominant cause of Former Employees' job separation was a shift in production to an affiliated Tyco Electronics facility in Harrisburg, Pennsylvania. Pub. Admin. R. at 19.

2. Former Employees' Motion for Administrative Reconsideration.

Former Employees filed a motion for administrative reconsideration of Labor's negative NAFTA-TAA determination, asserting again that their job separation was caused by a shift in production to Mexcio. *Id.* at 54. Based upon additional information provided during a conference call with Tyco Electronics company officials, Labor denied Former Employees' request for administrative reconsideration. *Tyco Elecs. Fiber Optics Div., Glen Rock, Pa.; Notice of Negative Determination Regarding Application for Reconsideration*, 67 Fed. Reg. 5,299 (Feb. 5, 2002). Labor stated that only "a negligible portion of the plant production was shifted to Mexico during the relevant period." Pub. Admin. R. at 69.

C. Litigation Before This Court.

Appearing *pro se*, Former Employees filed a complaint in this Court challenging Labor's negative determination. Pls.' Compl. at 1 (Jan. 30, 2002). Plaintiffs' counsel was appointed by the Court to represent the Former Employees *pro bono. Former Employees of Tyco Elecs. v. United States*, No. 02–00152 (Ct. Int'l Trade April 16, 2002) (order granting Plaintiffs' motion to proceed in *forma pauperis*).

1. The First Voluntary Remand.

Immediately after the Former Employees filed their first Rule 56.1 Motion for Judgment on the Agency Record, Defendants sought Plaintiffs' consent to a voluntary remand. *See* Def.'s Mot. for Voluntary Remand at 2. In seeking a voluntary remand, Defendant stated that "[a]fter review of the administrative record in light of the arguments [Plaintiffs] made in their Rule 56.1 motion, defendant seeks a remand to Labor to conduct a further investigation and make a redetermination." *Id.*

This Court granted Defendant's request for a voluntary remand and ordered that Defendant conduct a remand investigation and submit remand results by October 7, 2002. *Former Employees of Tyco Elecs. v. United States*, No. 02–00152 (Ct. Int'l Trade Aug. 6, 2002) (order granting voluntary remand) ("Voluntary Remand Order"). The Voluntary Remand Order, which was drafted and submitted by Defendant with its motion, mandated that Labor "conduct further investigation, [and] collect further evidence, including evidence from the plaintiffs." *Id.* at 1. Labor failed to timely comply with the Voluntary Remand Order and did not submit a remand determination to this Court on or before October 7, 2002.

On October 17, 2002, Plaintiffs submitted certain information to Defendant's counsel for use in the remand determination. *Tyco I*, 259 F. Supp. 2d at 1248 (citing the parties' *Timeline Stipulation*, Jan. 29, 2003). On November 12, 2002, Plaintiffs contacted Defendant to inquire about the status of the remand investigation. *Id.* At that time, Defendant's counsel informed Plaintiffs' counsel that the remand investigation had not started. *Id.*

2. Labor's First Remand Determination Filed Out of Time.

After Plaintiffs' counsel contacted Defendant, Defendant filed a motion for leave to file the remand results out of time. *Id.* In January 2003, Defendant filed a second motion for leave to file the remand results out of time. *Id.* Labor's remand determination was filed with the Court on January 17, 2003, more than five months after the matter had been remanded to Labor. *See Tyco Elecs., Fiber Optics Div.; Glen Rock, PA; Notice of Negative Determination on Reconsideration on Remand*, 68 Fed. Reg. 5,655 (February 4, 2003) ("*First Remand Results*"). This Court accepted the *First Remand Results* out of time and awarded Plaintiffs' attorney's fees for expenses incurred as a result of Defendant's delay under USCIT Rule 16(f). *Tyco I*, 259 F. Supp. 2d at 1250–53.

3. Labor's First Remand Investigation and Determination.

In the conducting the first remand investigation, Labor contacted Tyco Electronics officials and asked for sales figures for the relevant time period. Pub. Supplemental Admin. R. at 2. Tyco Electronics reported declining sales in the latter part of the relevant time period.

Conf. Supplemental Admin. R. at 5. Based on the reported declining sales, Labor surveyed two major Tyco Electronics customers regarding their imports of like products during the relevant time period. Pub. Supplemental Admin. R. at 17. According to Labor, the surveys revealed that one customer did not increase its imports of like products or products competitive with the items produced at the Glen Rock plant. *Id.* at 18. The other customer reported no direct import purchases during the relevant period and a "relatively low" amount of indirect imports during the latter part of the relevant period. *Id.* Based on these findings, Labor "affirm[ed] the original notice of negative determination of eligibility." *Id.*

4. The Court Ordered Second Remand.

Plaintiffs filed a second 56.1 Motion challenging Labor's determination in the *First Remand Results*. In May 2003, this Court ordered a second remand, finding that the customer surveys that Labor relied upon were incomplete and "insufficient to support Labor's conclusion." *Tyco II*, 264 F. Supp. 2d at 1331. The Court also found that Labor failed to conduct any further investigation or analysis to support its conclusion that a shift in production to Mexico did not occur. *Id.* at 1331–32. In fact, Defendant conceded that a second remand was necessary because the *First Remand Results* "[were] deficient in so far as they did not address information obtained from the Plaintiffs" as directed in this Court's order granting Defendant's request for voluntary remand. (Def.'s Mem. in Partial Opp'n to Pls.' Cmts. on Def.'s Negative Determination on Remand at 8.

This Court remanded the case to Labor "for further consideration and investigation of 1) the [ ] information submitted by Plaintiffs; 2) the propriety of conducting an import analysis to support the information contained in the customer surveys, 3) the seemingly contradictory information provided by Tyco Electronics regarding sales; and 4) the arguments made in Plaintiffs' [second] 56.1 Motion regarding a shift in production in light of the data contained in the [ ] information [submitted by Plaintiffs]." *Tyco II*, 264 F. Supp. 2d at 1333.

5. Labor's Second Remand Investigation and Determination.

After the second remand, Labor certified Plaintiffs as eligible to receive NAFTA-TAA benefits. *Tyco Elecs., Fiber Optics Div., Glen Rock, PA; Notice of Revised Determination on Remand*, 68 Fed. Reg. 41,185 (July 10, 2003) ("*Second Remand Results*"). Labor stated that it had "requested and obtained new and additional information and clarification from the company regarding plant production shifts to Mexico." *Id.* After reviewing this information, Labor "conclud[ed] that there was a shift of production to Mexico that contributed importantly to the worker separations and sales or production declines at the subject facility." *Id*.

6. The Court's Final Judgment.

After the *Second Remand Results* were filed with the Court, Plaintiffs informed the Court that the Former Employees had been told that they would be unable to receive certain TAA benefits because the statutory 104-week eligibility period for those allowances had expired during the pendency of this litigation. *See* Letter from Lenita Jacobs-Simmons, Reg'l Adm'r for the U.S. Dep't of Labor, to the Hon. Stephen Schmerin, Sec'y of Labor and Indus. for the State of Pa., of 02/27/04, at 1–2 ("Jacobs-Simmons Letter"); *see also* 19 U.S.C. § 2293(a)(2) ("[T]rade readjustment allowance shall not be paid for any week after the close of the 104-week period . . . that begins with the first week following the week in which the adversely affected worker was most recently totally separated"). Plaintiffs were informed that "[s]ince [Plaintiffs'] certification was issued after the expiration of the 104-week eligibility period for basic TRA for most covered Tyco workers[,] . . . it was not possible for most of the workers to qualify for any basic TRA." Jacobs-Simmons Letter at 1–2. At Plaintiffs' request, the Court held a telephone conference with the parties at which time Defendant's counsel and Plaintiffs' counsel informed the Court that they would "work together to resolve this issue." Letter from Def.'s Counsel to the Court of 09/03/03, at 1. During the next several months, the parties worked together to solve this problem and kept the Court apprised of the situation through weekly status reports. The issue was resolved in March 2004. *See* Jacobs-Simmons Letter at 2 ("Where there has been undue and extreme delay in issuing a certification due to circumstances of litigation, <u>and plaintiffs' actions did not substantially contribute to the delay</u>, the 104-week basic TRA eligibility period shall not begin until the certification is issued. . . . Equity and good conscience dictate that the Tyco workers be 'made whole' by being restored to the position they would have occupied had there been no delay in issuing the certification." (emphasis added).)

After this issue had been resolved, the parties submitted proposed judgment orders. On April 14, 2004, the Court issued its final judgment affirming Labor's certification of Plaintiffs eligibility to receive NAFTA-TAA benefits. *Tyco III*, 2004 Ct. Int'l Trade LEXIS 33, at *12–*13. The Court noted that Labor failed to follow this Court's specific instructions on remand. *Id*. (comparing *Tyco II*, 264 F. Supp. 2d at 1333 (ordering Defendant to (1) consider specific information obtained from Plaintiffs; (2) consider conducting an import analysis to support the customer survey responses; (3) resolve the seemingly contradictory information provided by Tyco Electronics regarding sales, and (4) discuss the specific arguments raised by Plaintiffs in their 56.1 Motion), with *Second Remand Results*, 68 Fed. Reg.

41,185 (failing to mention any information obtained from Plaintiffs and granting certification based on "new and additional information and clarification from the company")). The Court affirmed Labor's determination as implemented by the Jacob-Simmons Letter. *Id.* at *13.

DISCUSSION

Under the EAJA, fees and expenses must be awarded if (1) the claimant is a prevailing party; (2) the government's position during the administrative process or during litigation was not substantially justified; (3) no special circumstances make an award unjust; and (4) the fee application is timely and supported by an itemized fee statement. 28 U.S.C. § 2412(d)(1)(A)–(B); *see also Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003) (citing *INS v. Jean*, 496 U.S. 154, 158 (1990)). "The EAJA is a waiver of sovereign immunity that must be strictly construed." *Am. Bayridge Corp. v. United States*, 86 F. Supp. 2d 1284, 1285 (2000).

Here, Plaintiffs submitted an application for fees and expenses totaling $119,993.70. Pls.' Mem. in Support of Pls.' Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act ("Pls.' Br.") at Attach. F. Plaintiffs attached two itemized statements, entitled "Proforma 1" and "Proforma 2", to their application accounting for 707.8 hours of work performed. *See* Pls.' Attach. A. The Government contends that the Plaintiffs' application for fees and expenses should be denied for two reasons: (1) Plaintiffs have failed to establish that they meet the requirements for an eligible party under the EAJA; (2) the Government's position in this matter was substantially justified. Def.'s Resp. to Pls.' Application for Att'ys Fees and Expenses ("Def.'s Resp.") at 11–18. Alternatively, the Government contends that if the Court finds that Plaintiffs' application should be granted, Plaintiffs' application does not support an award for the full amount of attorney fees requested and should be reduced because it is unreasonable and excessive. *Id.* at 19–28.

As discussed below, this Court finds that Plaintiffs' application is sufficient to meet the requirements under the EAJA and the Government's position during this litigation was not substantially justified; thus, Plaintiffs' application for fees and expenses is granted with certain modifications.

PARTIES' CONTENTIONS

I. *Plaintiffs' Contentions.*

A. The Former Employees are Eligible Parties.

As evidence of Plaintiffs' fulfillment of the EAJA's "party" eligibility requirements, Plaintiffs submitted the Motion for Leave to Proceed In Forma Pauperis of Ms. Karen Hawks, the lead plaintiff, her supporting affidavit, and the Court's order granting the motion. Pls.' Attach. F. Ex. B. Ms. Hawks' affidavit states that her individual net worth is below the two million limit set by the EAJA. *Id.*

B. Labor's Position was Not Substantially Justified.

Plaintiffs contend that throughout the administrative process and this litigation, the Government's position has been to deny Plaintiffs' certification because there was no increase in imports and no shift in production to Mexico. Pls.' Br. at 15. Plaintiffs contend that this position was not substantially justified for many reasons. *Id.* at 15–16. First, as argued in their first 56.1 Motion, Plaintiffs claim that Labor's initial investigation "was incomplete, scant, inept and not supported by substantial evidence." *Id.* at 16. Plaintiffs contend that even after the Government requested the first remand "in light of the arguments [plaintiffs] made in their Rule 56.1 [brief]," Labor failed, in the *First Remand Results*, to consider the information provided by Plaintiffs in accordance with the Voluntary Remand Order. *Id.* (citing *Tyco II*, 264 F. Supp. 2d at 1330; Def.'s Mot. for Voluntary Remand at 2.) Plaintiffs contend that in the *First Remand Results*, "the Government reinstated the position it had articulated in the underlying investigation in the [*First Remand Results*] although it had already conceded that the underlying investigation was inadequate." *Id.*

Plaintiffs argue that by ordering a second remand in *Tyco II*, this Court recognized that the Government's position in the *First Remand Results* was without a basis in law or fact. *Id.* at 17. Plaintiffs contend that even "the Government conceded that the underlying investigation was inadequate" because the Government indicated that an additional remand was necessary. *Id.*

Plaintiffs assert that after two and a half years of litigation, Labor abandoned its earlier position and certified Plaintiffs in the *Second Remand Results*. *Id.* However, Plaintiffs note that Labor "failed to include findings of fact and conclusions of law in its [*Second Remand Results*]." *Id.* Plaintiffs contend that it cannot be determined from the *Second Remand Results* "why the Government abandoned its position." *Id.* Plaintiffs contend that the Government's "abrupt reversal" in position is a "concession that its position had been . . . without a basis in law and fact." *Id.*

Plaintiffs contend that the Government's position during this litigation even fails the "substantial evidence" standard, which is more lenient than the substantially justified standard applicable for EAJA determinations. *Id.* at 18. Plaintiffs contend that "[g]iven that the substantial evidence standard is more lenient than the substantially justified standard, this court should determine that the government's position was not substantially justified." *Id.* at 18–19.

Additionally, Plaintiffs assert that there are no special circumstances in this case that would make an award of fees unjust. *Id.* at

19 (citing 28 U.S.C. § 2412(d)(1)(A)). Plaintiffs claim that other considerations warrant the award of attorney fees in this case, including the remedial nature of the trade adjustment assistance statute, Defendant's dilatory tactics during litigation, and Defendant's disregard for the Court's orders and rules. *Id.* at 24–26.

C. The Court Should Award Specialized Attorney Fees.

Plaintiffs acknowledge that the EAJA specifically provides that "fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." *Id.* at 20 (quoting 28 U.S.C. § 2412(d)(2)(A)(ii)). However, Plaintiffs ask this Court to award a higher fee because it is justified under the "special factor" standard of the EAJA as articulated by the Supreme Court in *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). Plaintiffs assert that *Pierce v. Underwood* established that "special factor refers to attorneys having some distinctive knowledge or specialized skill needed for the litigation in question." *Id.* at 20 (quoting *Pierce*, 487 U.S. at 572). Plaintiffs contend that lead counsel, Mr. Jimmie Reyna, has specialized skills in the field of international trade law which "have been essential in securing trade adjustment assistance" for Plaintiffs. *Id.* at 21. Plaintiffs contend that because of Mr. Reyna's specialized skills, they are entitled to attorney fees based on hourly rates of $310 to $365 per hour for lead counsel and $140 to $195 per hour for associate counsel, which are the prevailing market rates in the relevant community. *Id.* at 20–21 (citing Human Soc'y of the United States v. Bush, 159 F. Supp. 2d 707, 712 (Ct. Int'l Trade 2001); Earth Island Inst. v. Christopher, 942 F. Supp. 597, 612 (Ct. Int'l Trade 1996)).

D. The Court Should Award Fees that Reflect a Cost of Living Adjustment.

Alternatively, if the Court finds that special factors are not present in this case, Plaintiffs ask the Court to award fees at the $125 per hour rate approved under the EAJA with a cost of living adjustment ("COLA"). *Id.* at 22 (citing Levernier Const., Inc. v. United States, 947 F.2d 497, 503 (Fed. Cir. 1991); Oliveira v. United States, 827 F.2d 735, 742 (Fed. Cir. 1987)). Plaintiffs assert that the COLA is calculated using the Consumer Price Index for all Urban Consumers ("CPI–U"), which is compiled by the United States Department of Labor, Bureau of Labor Statistics. *Id.* at 23. Plaintiffs contend that any increase is determined from the baseline CPI–U as of March 1996, the date on which the $125 hourly rate cap became effective. *Id.* at 23 (citing Gonzalez v. United States, 44 Fed. Cl. 764, 770–71 (1999)). Plaintiffs contend that the CPI–U for March 1996 was 155.7. *Id.* at 23 (citing Cal. Marine Cleaning, Inc. v. United States, 43 Fed.

Cl. 724, 734 (1999)). Based on the CPI–U for 2002 (188.2), 2003 (193.5), and 2004 (197.68), Plaintiffs contend that the fees with the COLA are $151.25, $156.25, $158.75 per hour for 2002, 2003, and 2004 respectively. *Id.* at 23 (citing Pls.' Attachs. E, F).

E. The Court Should Award Fees for Paralegals and Summer Associates Based on the Prevailing Market Rates.

Plaintiffs contend that the hourly rates for paralegal and summer associates should be based on the prevailing market rates of $95, $100, and $115 per hour. *Id.* at 23. Plaintiffs contend that, in *Earth Island Inst.*, 942 F. Supp. at 615, the court determined that the appropriate compensation for paralegals and summer associates should be determined by the marketplace. *Id.* Plaintiffs contend that the Court, in *Tyco I*, accepted the $95 per hour rate for paralegals, and that Mr. Jimmie Renya attests that $115 per hour is consistent with the prevailing market rate for summer associates. *Id.* at 24 (citing Tyco I, 259 F. Supp. 2d at 1253).

II. *Defendant's Contentions.*

A. Labor's Position was Substantially Justified Throughout the Administrative Proceedings and this Litigation.

Defendant contends that Labor's position was substantially justified. Def.'s Resp. at 12. Defendant stresses that "[t]he mere fact that the Government loses a case does not establish that its defense was not substantially justified." *Id.* (citing Luciano Pisoni, 837 F.2d at 467). Further, Defendant argues that "the fact that, upon the merits, the Court determined that Labor failed to examine plaintiffs' relevant submissions and offer satisfactory explanation for its action does not establish that the Government's position was not substantially justified." *Id.* (citing F.J. Vollmer Co. v. Magaw, 102 F.3d 591, 595 (D.C. Cir. 1996)).

First, Defendant asserts that Labor's position at the administrative level was substantially justified. *Id.* at 13. Defendant claims that Labor "requested information concerning the production of like or directly competitive products from Tyco [Electronics] during the original investigation." *Id.* Defendant notes that during the administrative investigation, Tyco Electronics officials responded that the layoffs at the Glen Rock facility were due to the transfer of work to another Tyco Electronics facility in Pennsylvania, not due to a shift in production to Mexico. *Id.* at 14 (citing Pub. Admin. R. at 15–16). Defendant contends that the follow-up questioning of a company official did not reveal any information that contradicted Tyco Electronics' claim that production did not shift to Mexico. *Id.* (citing Pub. Admin. R. at 66–67). Defendant contends that "Labor's position [at the administrative level] . . . also had a rational basis in law and fact despite its failure to obtain further, more detailed information from

Tyco [Electronics] that, on court-ordered remand much later in litigation, ultimately resulted in certification." *Id.*

Second, Defendant contends that Labor's position during litigation was also substantially justified. *Id.* at 15. Regarding the *First Remand Results,* Defendant contends that "Labor's conclusions . . . had a rational basis in law and fact based upon the statements of company employees." *Id.* Defendant notes that Labor's voluntary remand investigation sought "company-wide sales information . . . in addition to customer survey responses." *Id.* Defendant argues that Labor reasonably relied on this information in the *First Remand Results* to determine that there was no shift in production to Mexico "despite the Court's subsequent finding that the customer survey data was incomplete." *Id.* Defendant asserts that Labor's position was rational based on the combination of "complementary" information obtained during Labor's administrative investigation and on voluntary remand. *Id.* at 15–16.

Defendant argues that the fact that Labor did not provide any analysis of any information submitted by or obtained from Plaintiffs in the *Second Remand Results* "should have no bearing upon a substantial justification finding . . . because Labor certified [Former Employees] as eligible to receive TAA benefits and, thus, further factual analysis was rendered unnecessary." *Id.* at 16.

B. Plaintiffs' Application Fails to Establish that Plaintiffs' are Eligible Parties.

Defendant contends that Plaintiffs' EAJA application fails to establish that Plaintiffs are eligible parties because Plaintiffs' application does not provide evidence of all the Plaintiffs' net worth and does not establish that the fees requested were actually incurred by Plaintiffs. *Id.* at 16, 19–20. First, Defendant asserts that Plaintiffs do not meet the net worth requirement. *Id.* at 16. Defendant quotes the definition of "party" set forth in the EAJA: a " 'party' means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed." *Id.* at 17 (quoting 28 U.S.C. § 2412(d)(2)(B)). In this case, Defendant asserts that the application "for all 88 plaintiffs includes only an affidavit of one plaintiff concerning her individual assets." *Id.* Defendant urges this Court to require Plaintiffs to " 'set forth a more explicit statement about [each plaintiff's] net worth' . . . or reduce any award of attorney fees to only allow recovery of fees based on the proportion of [Plaintiffs] who establish eligibility." *Id.* at 19 (quoting Bazlo v. West, 150 F.3d 1380, 1383–84 (Fed. Cir. 1998) and citing Sierra Club v. United States Army Corps of Eng'rs, 776 F.2d 383, 393–94 (2d Cir. 1985)).

Additionally, Defendant contends that Plaintiffs' application should be denied because Plaintiffs failed to provide any evidence that fees for the work listed in the Proforma 1 and Proforma 2 statements were "incurred" by Plaintiffs. *Id.* Defendant notes that "Plaintiffs' application contains no contemporaneous invoices, receipts, cancelled checks, or agreement with counsel that would be probative on the issue of incurrence." *Id.* at 19–20. Although Defendant acknowledges that Plaintiffs' counsel was appointed by this Court to represent Plaintiffs *pro bono*, Defendant contends that Plaintiffs must submit proof of billing or an agreement to satisfy the "incurred" requirement under the EAJA. *Id.* at 21.

C. Plaintiffs' Application Does Not Support an Award for the Full Amount of Fees and Expenses Requested.

Defendant contends that, if this Court finds that fees are appropriate in this case, the Court should decrease the amount of attorney fees awarded because (1) the Proforma statements submitted in support of Plaintiffs' application are deficient and contain inaccuracies; (2) the amount requested is excessive; (3) Plaintiffs should not be allowed to double-recover fees already awarded by the Court in *Tyco I*; (4) certain post-judgment activities are not compensable under the EAJA. *Id.* at 19.

First, Defendant asserts that Proforma 1 and Proforma 2, attached in support of Plaintiffs' application for fees, are inadequate. *Id.* at 20 (referencing Pls.' Attach. A). Defendant contends that Proforma 1 and Proforma 2 contain the following inconsistencies and deficiencies: the client name listed is different on each; the two case designations used are overly-broad and generic; and there is no evidence that Plaintiffs' attorneys would have actually billed Plaintiffs at the rates listed. *Id.* at 20–21.

Second, Defendant contends that Plaintiffs' requested fees are excessive for several reasons. *Id.* at 21–25. Defendant asserts that Plaintiffs' requested hourly rates far exceed the EAJA statutorily allowed rates and should be reduced accordingly. *Id.* at 21 (citing 28 U.S.C. 2412(d)(2)(A)). Defendant asserts that Plaintiffs seek fees ranging from $135 to $365 per hour. *Id.* (citing Pls.' Attach. A). Contrary to Plaintiffs' claim, Defendant asserts that no special factors exist for awarding fees in excess of the $125 statutorily-allowed hourly rate. *Id.* at 22 (citing Pls.' Br. at 21; Pls.' Attachs. C, D). Specifically, Defendant contends that trade adjustment assistance cases "do not require any specialized skills or knowledge." *Id.* at 23. Defendant notes that this Court asks "<u>any</u> attorney admitted to practice before the court" to volunteer to represent TAA plaintiffs. *Id.* (citing Court's announcement seeking attorneys to accept TAA cases, *available at* http://www.cit.uscourts.gov/infomational/cac.htm (last visited June 7, 2004)). Defendant contends that Plaintiffs' application "is replete with evidence that plaintiffs' attorneys were learning about [TAA] law as this litigation unfolded," which undermines Plaintiffs' claim of specialized skill in this area of the law. *Id.* at 23–24 (citing F.J. Vollmer, 102 F.3d at 598). Defendant also argues that Plaintiffs' request for a cost of living adjustment should be rejected because "the statute does not 'absolutely require' it." *Id.* at 23 (quoting Baker v. Bowen, 839 F.2d 1075, 1084 (5th Cir. 1988)).

Additionally, Defendant contends that the fees requested are excessive because they contain summer associate hours which should not be compensable under the EAJA. *Id.* at 24. Defendant cites *Libas*, 283 F. Supp. 2d at 1333–34, wherein the court examined a request for such fees for summer associates and reduced the requested fees by two-thirds. *Id.* Defendant also asserts that the "hundreds of hours" that counsel devoted to Plaintiffs' first motion for judgment on the agency record is unreasonable. *Id.* at 24. Defendant contends that these fees include "teams of attorneys (and summer associates) working 14–16-hour days during the period preceding the filing of the brief." *Id.* at 24–25 (citing Proforma 1 at 5). Defendant notes that on the same day, one summer associates spent 11.4 hours on revising Plaintiffs' brief, while another summer associate worked 15.1 hours on a draft of the same brief. *Id.* at 25 (citing Proforma 1 at 5). Defendant also contends that the Court should not grant the fees requested that reflect "time spent conducting background research to familiarize the attorneys (and summer associates) with NAFTA-TAA issues, generally." *Id.* at 27. Defendant asserts that fees for background research are presumptively unreasonable. *Id.* (citing Case v. Unified Sch. Dist. No. 223, Johnson County Kan., 157 F.3d 1243, 1253 (10th Cir. 1998); Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Defendant contends that these fees are excessive and should be reduced by the Court. *Id.*

Third, Defendant claims that Plaintiffs are seeking to "double-recover" the fees that this Court awarded to Plaintiffs as sanctions for Defendant's delay in filing the *Second Remand Results*. *Id.* at 25, 28 (citing Tyco I, 259 F. Supp. 2d at 1253). Defendant contends that those fees were paid in accordance with this Court's order and should not be included in this award should the Court find that fees are appropriate under the EAJA. *Id.* at 28.

Finally, Defendant argues that Plaintiffs should not be allowed to recover the fees that were incurred after Plaintiffs were certified by the Department of Labor because those fees "do not reflect compensable post-judgment activity." *Id.* at 25 (citing Pennsylvania v. Del. Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 558–59 (1986); Keith v. Volpe, 833 F.2d 850, 855 (9th Cir. 1987)). Defendant asserts that contrary to other cases in which fees for post-judgment activity have been allowed, "[t]his case does not involve a consent decree or similar judgment over which the Court may assert continuing jurisdiction." *Id.* Defendant claims that any problems with the administration of Plaintiffs' TAA benefits after certification by the Department of Labor should have been dealt with through state government channels. *Id.* at 26. Thus, Defendant argues, "any attorney fees connected to aiding these workers with their benefits is not part of this litigation and not properly before the Court." *Id.* at 26 (citing 28 U.S.C. § 2395(d) which grants this Court jurisdiction over challenges to a "final determination of the Secretary of Labor under [19 U.S.C. §] 2273").

ANALYSIS

The Court holds that Plaintiffs' application for fees and expenses under the EAJA meets the necessary requirements and should be granted because Defendant's position in this litigation was not substantially justified and no other reasons make an award unjust. *See* 28 U.S.C. § 2412(d). Based upon Plaintiffs' application and Defendant's response, this Court awards attorney fees based upon the statutory cap of $125 per hour with a cost of living adjustment, and declines to award any fees for certain unreasonable entries included in Proforma 1 and Proforma 2.

A. The Former Employees are Eligible Parties under the EAJA.

Although it is uncontested that Plaintiffs prevailed in this action under the EAJA, Defendant contends that Plaintiffs have failed to establish that they are eligible parties under the EAJA. Def.'s Resp. at 16–21.

First, Defendant contends that Plaintiffs have failed to establish that they meet the net worth requirements under the EAJA. *Id.* at 16–18. This Court has found that party eligibility for EAJA purposes is satisfied by a primary plaintiff's net worth not exceeding the two million dollars at commencement of the action. *See Former Employees of Oxford Automotive U.A.W. Local 2088 v. United States Dep't of Labor*, No. 04–52, slip op. at 1 n.2, 2004 WL 1146102, at *1 n.2 (Ct. of Int'l Trade May 18, 2004). This Court finds that Plaintiffs have provided sufficient evidence to prove that their individual net worth was less than two million dollars at the time this action was filed as required by § 2412(d)(2)(B) of the EAJA. In support of Plaintiffs' eligibility, Plaintiffs attached to their EAJA application the Motion to Proceed in Forma Pauperis of Ms. Karen Hawks as their lead plaintiff, which this Court treated as primary plaintiff. This Court granted Plaintiffs' Motion to Proceed in Forma Pauperis. Pls.' USCIT Form 15 at Ex. B (Pls.' Attach. F). Ms. Hawks' affidavit in support of her Motion to Proceed in Forma Pauperis states that her net worth is below the two million maximum set by the EAJA. *See id.*

Although there are eighty-eight people covered by Labor's certification for eligibility to receive NAFTA-TAA benefits as former employees of the Tyco Electronics, Glen Rock, Pennsylvania facility, it is clear from the complaint filed in this action, the Court's order granting Ms. Hawks' request to proceed *in forma pauperis*, which appointed *pro bono* counsel, Plaintiffs' EAJA application, which list the applicant as "Former Employees of Tyco Electronics, Fiber Optics Division, Karen Hawks, Lead Plaintiff Worker," and the statements attached to Plaintiffs' application that the work performed by counsel was for Ms. Karen Hawks. *See* Pls.' Compl. at 1 (with corresponding letter from Clerk's Office to Ms. Karen Hawks of 02/08/02); *Former Employees of Tyco Elecs. v. United States*, No. 02–00152, (Ct. Int'l Trade Mar. 20, 2002) (order granting motion to proceed *in forma pauperis*); Pls.' USCIT Form 15 at Ex. B (Pls.' Attach. F); Proforma 1 at 1 ("MATTER NAME: Hawks, Karen . . . ADDRESS: Karen Hawks"; Proforma 2 at 1 ("CLIENT NAME: Hawks, Karen . . . ADDRESS: Karen Hawks"). Thus, the Court finds that Ms. Hawks affidavit is sufficient to meet the EAJA's eligible party net worth requirements.

Second, Defendant contends that Plaintiffs' application is deficient because Plaintiffs failed to provide any evidence that fees for the work listed in the Proforma 1 and Proforma 2 statements were "incurred" by Plaintiffs. *See* Def.'s Resp. at 19–20. This Court is not persuaded by Defendant's arguments. Under the EAJA, "a court shall award to a prevailing party . . . fees and other expenses, in addition to any costs . . . <u>incurred</u> by that party." 28 U.S.C. § 2412(d)(1)(A). "[C]ourts have awarded attorney fees under EAJA and similar fee-shifting statutes requiring that fees be 'incurred' when the prevailing party is represented by a legal services organization or counsel appearing *pro bono*." *Ed A. Wilson, Inc. v. Gen. Servs. Admin.*, 126 F.3d 1406, 1409 (Fed. Cir. 1997) (citing Watford v. Heckler, 765 F.2d 1562, 1567 n.6 (11th Cir. 1985) ("It is well-settled that, in light of the [EAJA's] legislative history and for reasons of public policy, plaintiffs who are represented without charge are not generally precluded from an award of attorneys' fees under the EAJA."); *Cornella v. Schweiker*, 728 F.2d 978 (8th Cir. 1984)). Here, as Defendant acknowledges, Plaintiffs' counsel was appointed by the Court to represent Plaintiffs *pro bono*. *See* Def.'s Resp. at 21; *Former Employees of Tyco Elecs. v. United States*, No. 02–00152, (Ct. Int'l Trade Mar. 20, 2002) (order granting motion to proceed *in forma pauperis*). Contrary to Defendant's contentions, no proof of any billing or agreement is necessary to satisfy the "incurred" requirement under the EAJA because Plaintiffs' are represented on a pro bono basis.

B. This Court Finds that the Government's Position in this Litigation was Not Substantially Justified.

When evaluating the merits of the Government's litigating position, the court "must reexamine the legal and factual circumstances of the case from a different perspective than that used at any other stage of the proceeding." *Libas*, 314 F.3d at 1366 (quoting *United States v. Hallmark Constr.*, 200 F.3d 1076, 1079 (7th Cir. 2000); *see also* 28 U.S.C. § 2412(d)(1)(B) ("Whether or not the position of the United States was substantially justified shall be determined on the basis of the record . . . which is made in the civil action for which fees and other expenses are sought."). An examination of the development of this case shows that the Government's position in this litigation was not substantially justified.

The fact that Former Employees prevailed in this litigation is not sufficient to show that the Government's position was not substantially justified. *See Luciano*, 837 F.2d at 467. The Federal Circuit explained that

> [t]he decision on an award of attorney fees is a judgment independent of the result on the merits, and is reached by examination of the government's position and conduct through the EAJA 'prism,' . . . not by redundantly applying whatever substantive rules governed the underlying case.

Id. (internal quotation marks and citations omitted). Substantial justification means " 'justified in substance or in the main' — that is, justified to a degree that could satisfy a reasonable person. That is no different from [a] 'reasonable basis both in law and fact.' " *Pierce*, 487 U.S. at 565 (citations omitted). It is the Government's burden to show that its position in litigation, as well as at the administrative level, "had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 714–15 (Fed. Cir. 1991). "[T]he imperative language of § 2412(d)(1)(A), 'a court shall award,' requires that the government bear[ ] the burden of proving its position was substantially justified." *Libas*, 314 F.3d at 1365 (citing *Neal & Co. v. United States*, 121 F.3d 683, 686 (Fed. Cir. 1997)); *Hallmark Constr.*, 200 F.3d at 1079 (noting that the EAJA does not create a presumption that a prevailing party will recover attorneys' fees and expenses, but that the government must prove that its position was substantially justified). Often, "the question [of whether the Government's position was substantially justified] will turn upon not merely what was the law, but what was <u>the evidence regarding the facts</u>." *Pierce*, 487 U.S. at 560 (emphasis added).

The Government's position in this litigation to deny Plaintiffs' eligibility for certification was based on information obtained from Labor's investigation during the administrative process and Labor's investigations and determinations on remand. This Court is not persuaded by the Government's argument that this information provided a reasonable basis for Labor to deny Plaintiffs' eligibility for certification during this litigation.[2] During this litigation, Labor repeatedly disregarded evidence of critical facts necessary to determine if Plaintiffs were eligible to receive TAA benefits. Specifically, Labor refused to accept information submitted by Plaintiffs, which allegedly contradicted statements made by Tyco Electronics officials. Additionally, Labor failed to comply with the orders of this Court

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[2] The Court need not address Labor's position at the administrative level because the Court finds that the Government's position during this litigation was not substantially justified.

asking Labor to substantiate its determinations with additional legal and factual analysis on remand; and did not abide by its own assertions that it would gather information from Plaintiffs either in support of or in contradiction to their petition for certification. During this litigation, Labor continued to rely on incomplete and allegedly contradictory information to support its position. Finally, this Court finds that Labor failed to provide any analysis regarding the change in its position to certify Plaintiffs as eligible to receive benefits in the *Second Remand Results* that might have aided the Court in determining the reasonableness of its position during this litigation.

1. First Remand Results.

This Court finds that the Government's position in the *First Remand Results* to deny Plaintiffs' eligibility for certification was not substantially justified. First, Labor conceded that the *First Remand Results* were in direct violation of this Court's Voluntary Remand Order because they did not contain any information gathered or obtained from Plaintiffs. Def.'s Mem. in Partial Opp'n to Pls.' Cmts. on Def.'s Neg. Determination on Remand at 8. In ordering the first remand, this Court signed the draft order that was submitted with Defendant's motion, which stated that Labor would "conduct further investigation . . . [and] collect further evidence, including evidence from the plaintiffs." Voluntary Remand Order at 1. In *Tyco II*, this Court found that Labor's failure to gather <u>any</u> information from Plaintiffs, and Labor's rejection of the information voluntarily submitted by the Plaintiffs, was a result of Labor's arbitrary and capricious treatment of this remand investigation. *Tyco II*, 264 F. Supp. 2d at 1330.

As the Government acknowledged by conceding that an additional remand was necessary, Labor's denial of eligibility was not based upon an adequate examination of the available evidence. The Court remains unpersuaded by the Government's post hoc rationalizations that Labor considered the information that was submitted by Plaintiffs and merely failed to address such information in the *First Remand Results* because the information was <u>not</u> made a part of the administrative record and was not mentioned or referenced in Labor's determination. The Court finds that Labor's position in the *First Remand Results* was not substantially justified because it failed to consider any information gathered from Plaintiffs contrary to Defendant's voluntary remand request and this Court's order.

Second, this Court finds that the Government's position in the *First Remand Results* was not substantially justified because it was based upon incomplete and allegedly contradictory information. In the *First Remand Results*, Labor took the position that the Former Employees failed to qualify for NAFTA-TAA because "imports . . . did not contribute importantly to [the] workers' separations." Pub.

Supplemental Admin. R. at 16, 18. Labor based its conclusion on two customer surveys conducted after Labor had requested company sales figures for the relevant time periods. (*Id.* at 17–18.) In *Tyco II*, this Court found that the customer surveys contained incomplete information. *Tyco II*, 264 F. Supp. 2d at 1331. The Court found that the incomplete surveys were insufficient to support Labor's determination on remand. *Id.* Defendant's contention that Labor's position after the voluntary remand had "a rational basis" despite the fact that the Court found that the customer surveys were incomplete because the information came from a "presumptively reliable source and was uncontradicted," Def.'s Resp. at 15, conflicts with the clear finding of the Court in *Tyco II*. *Tyco II*, 264 F. Supp. 2d at 1331. The Court finds Labor's reliance on the incomplete customer surveys does not have a rational basis in law or fact.

Additionally, this Court holds that the Government's position in the *First Remand Results* to deny Plaintiffs' eligibility because the only shift in production was a domestic shift to an affiliated Tyco Electronics plant in Harrisburg, Pennsylvania, was not substantially justified. The Court finds that this position was not substantially justified because the record supporting the *First Remand Results* did not indicate that Labor conducted any further investigation on remand regarding the alleged domestic transfer. *Tyco II*, 264 F. Supp. 2d at 1331–32. As the Court found in *Tyco II*, Labor merely relied on its initial investigation, which it conceded to be insufficient, to support this position. *Id.* at 1332.

The only support for the Government's position in denying certification after the *First Remand Results* were unverified statements from untitled Tyco Electronics company officials and the two customer surveys discussed above. *See* Notes to Conference Call concerning Tyco Electronics, Fiber Optics Division, Glen Rock, Pennsylvania with Steve Reynosa and Sue Mullins and others on January 14, 2002 (Conf. Admin. R. at 66–67); Letter from Tom Christner Responding For Shane NorthCraft [sic], Tyco Electronics, Middleton [sic], Pennsylvania to Elliot Kushner of 11/13/02 (Conf. Supplemental Admin. R. at 4–5). Although Labor may appropriately rely on the unverified statements of company officials, *see, e.g.*, *Int'l Union, UAW Local 1283 v. Reich*, 20 F. Supp. 2d 1288, 1297 n.15 (Ct. Int'l Trade 1998); *United Steel Workers of Am., Local 1082 v. McLaughlin*, 15 Ct. Int'l Trade 121, 122–23 (1991), such unverified statements "will not amount to substantial evidence if [they are] contradicted by logic or other pertinent information in the record." *Former Employees of Pittsburgh Logistics Systems, Inc., v. United States Sec'y of Labor*, No. 02–387, slip op. at 15, 2003 Ct. Int'l Trade LEXIS 18, at *24 (Ct. Int'l Trade Feb. 28, 2003). As the Court found in *Tyco II*, the statements of the Tyco Electronics official were allegedly contradicted by the information that Plaintiffs submitted, which Labor failed to even consider. *Tyco II*, 264 F. Supp. 2d at 1331. Additionally, the Court noted other contradictions in the sales information provided by Tyco Electronics. *See Tyco II*, 264 F. Supp. 2d at 1331 (comparing Conf. Admin. R. at 34 with Conf. Supplemental Admin. R. at 5). This Court holds that it was not reasonable for the Government to defend the position that Plaintiffs were not eligible based upon such tenuous factual support.

2. Second Remand Results.

As mentioned above, in its response to Plaintiffs' second 56.2 Motion, the Government conceded that a second remand was appropriate because Labor failed to address the information from Plaintiffs. Def.'s Mem. in Partial Opp'n to Pls.' Cmts. on Def.'s Neg. Determination on Remand at 8. On remand, this Court ordered that "Labor should detail its analysis and evaluation of the [ ] information [submitted by Plaintiffs, and] conduct any further investigation that might be necessary to resolve any inconsistencies that are revealed in its analysis of th[at] information versus the statements of Tyco Electronics company officials." *Tyco II*, 264 F. Supp. 2d at 1330. In the *Second Remand Results*, Labor certified Plaintiffs and stated that

> On the current, court-ordered remand, the Department requested and obtained new and additional information and clarification from the company regarding plant production shifts to Mexico. Upon careful review of the new data, it has been determinated [that] more than a negligible portion of production was shifted to Mexico during the relevant period.
>
> Conclusion
>
> After careful review of the additional facts obtained on the current remand, I conclude that there was a shift of production to Mexico that contributed importantly to the worker separations and sales or production declines at the subject facility.

Second Remand Results at 3.

As the Court observed in *Tyco III*, Labor failed to follow this Court's specific instructions on remand. *Tyco III*, 2004 Ct. Int'l Trade LEXIS 33, at *12–*13 (comparing *Tyco II*, 264 F. Supp. 2d at 1333 (directing Defendant to consider :1) the [ ] information submitted by Plaintiffs; 2) the propriety of conducting an import analysis to support the information contained in the customer surveys; 3) the seemingly contradictory information provided by Tyco Electronics regarding sales; and 4) the arguments made in Plaintiffs' 56.1 Motion regarding a shift in production in light of the data contained in the information [submitted by Plaintiffs]"), with *Second Remand Results*, 68 Fed. Reg. 41,185 (failing to mention any information obtained from Plaintiffs and granting certification based on "new and additional information and clarification from the company")).

Although Plaintiffs are not challenging Labor's position in the *Second Remand Results*, the Court notes that the *Second Remand Results* fail to provide any additional facts or legal analysis that would aid the Court in determining the reasonableness of Labor's prior position to deny Plaintiffs' eligibility for certification. Defendant did not file with the Court a supplemental administrative record, and so the Court is left to assume that Labor reached its conclusion in the *Second Remand Results* to certify the Plaintiffs based upon the evidence discussed above.

C. Plaintiffs' Application for Fees is Granted with Certain Adjustments and Deductions.

The Court grants Plaintiffs' application for fees and expenses with certain adjustments and deductions. First, the Court finds that Plaintiffs have failed to set forth sufficient "special factors" that would entitle Plaintiffs to an award of fees based on an hourly rate above the $125 cap set in the EAJA. Second, this Court finds that a cost of living adjustment to the $125 statutory hourly rate is appropriate. Third, the Court awards fees for work performed by paralegals and summer associates at the prevailing market rate. Fourth, the Court deducts the 58.1 hours worked in relation to Defendant's delay in filing the *First Remand Results* because Plaintiffs were already compensated for that work in *Tyco II*. Fifth, the Court finds that the other fees requested are reasonable with the exception of a few entries detailed below. Finally, the Court finds that most of the fees requested for work completed after the Plaintiffs were certified by Labor are compensable under the EAJA.

1. Plaintiffs' Fees are Capped at the Statutorily Hourly Rate.

Under the EAJA, " 'fees and other expenses' includes . . . reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)" 28 U.S.C. § 2412(d)(2)(A)(ii). In *Pierce v. Underwood*, the Supreme Court established that "special factor refers to attorneys having some distinctive knowledge or specialized skill <u>needed for the litigation in question</u>." *Pierce*, 487 U.S. at 572 (emphasis added). Plaintiffs contend that lead counsel, Mr. Jimmie Reyna, has specialized skills in the field of international trade law which "have been essential in securing trade adjustment assistance" for Plaintiffs. Pls.' Br. at 21. Mr. Reyna's expertise in the field of international law is not questioned in this case; however, this Court finds that such specialized skills were not needed for this litigation. As Defendant notes, the Court encourages all attorneys admitted at the Court to volunteer their time as court appointed counsel in trade adjustment assistance cases. Def.'s Resp. at 23. The basic litigation skills needed for these types of cases apply "to a broad spectrum of litigation and thus are considered to be covered by the baseline statutory rate." *Phillips v. Gen. Servs. Admin.*, 924 F.2d 1577, 1584 (Fed. Cir. 1991). This Court holds that Plaintiffs are entitled to recover the statutory rate with the cost of living adjustment discussed below.

2. Plaintiffs Are Allowed to Recover Fees at the Statutory Hourly Rate Plus a Cost of Living Adjustment.

This Court determines that "an increase in the cost of living" justifies a higher fee in this case. *See* 28 U.S.C. § 2412(d)(2)(A)(ii). Judicial discretion in granting cost of living adjustments "effectuates Congress' intent . . . to provide adequate compensation notwithstanding inflation." *Payne v. Sullivan*, 977 F.2d 900, 903 (4th Cir. 1992) (quoting Sullivan v. Sullivan, 958 F.2d 574, 578 (4th Cir. 1992)). As Plaintiffs contend, the COLA in this case is calculated using the Consumer Price Index for all Urban Consumers ("CPI–U"). *See Kerin v. USPS*, 218 F.3d 185, 194 (2d Cir. 2000) ("[t]he district court may choose to apply a cost of living adjustment to [the statutory rate], as measured by the Consumer Price Index") (citing 28 U.S.C. § 2412(d)(2)(A); Harris v. Sullivan, 968 F.2d 263, 265 (2d Cir. 1992)); *see also Headlee v. Bowen*, 869 F.2d 548, 550–52 (10th Cir. 1989) ("[t]he Consumer Price Index is sufficient evidence upon which to calculate the cost of living . . . for the purpose of determining an EAJA fee award" (citation omitted)). Defendant does not challenge Plaintiffs' calculations of the statutory rate with the COLA based on the CPI–U. However, after reviewing Plaintiffs' calculations and the CPI–U information available for the Northeast Urban Area from the Bureau of Labor Statistics, this Court finds that Plaintiffs' calculations must be adjusted slightly to account for mathematical corrections. *See* Consumer Price Index - All Urban Consumers, Northeast Urban Area, *available at* http://www.bls.gov/cpi/ (last visited Aug. 23, 2004).

As detailed in Plaintiffs' application, the base CPI–U (not seasonally adjusted) for March 1996 was 155.7; the CPI–U for Northeast Urban Areas for 2002 was 188.2; for 2003 it was 193.5; and the average for the first four months of 2004 was 197.68. Pls.' Br. at 23 (citing Pls.' Attach. E); *see also* Consumer Price Index - All Urban Consumers, Northeast Urban Area, *available at* http://www.bls.gov/cpi/ (last visited Aug. 23, 2004); *Kerin*, 218 F.3d at 194 ("the hourly rate . . . should only be increased by the corresponding Consumer Price Index for each year in which the legal work was performed" (citations omitted)). Accordingly, attorney fees awarded for 2002 will be calculated at the hourly rate of $151.09 ($125.00 at 155.7 equates to

$151.09 at 188.2); fees for 2003 will be calculated at the hourly rate of $155.35 ($125.00 at 155.7 equates to $155.35 at 193.5); and attorney fees 2004 will be calculated at the hourly rate of $158.70 ($125.00 at 155.7 equates to $158.70 at 197.68) .

3. Plaintiffs are Allowed Under the EAJA to Recover for Fees for Work Performed by Summer Associates and Paralegals at the Prevailing Market Rate.

Defendant does not challenge the prevailing market rate that Plaintiffs claim for paralegal services: $95.00 per hour for 2002; $100.00 per hour for 2003. Pls.' Br. at 22–24; Proforma 1 at 1. Likewise, Defendant does not challenge the market rate claimed for summer associates, $95.00 to $115.00 per hour. Pls.' Br. at 22–24; Proforma 1 at 1. Rather, Defendant claims that Plaintiffs should not be allowed to recover fees for work performed by summer associates. Def.'s Resp. at 24. This Court has rejected the argument that summer associate and law clerk work is not compensable under the EAJA. *See Humane Soc'y*, 159 F. Supp. 2d at 712–13. The court has held that, in accordance with the Supreme Court's decision in *Missouri v. Jenkins*, 491 U.S. 274, 287 (1989), "the appropriate compensation for paralegals, law clerks, and summer associates should be determined by the marketplace." *Humane Soc'y*, 159 F. Supp. 2d at 712; *see also Earth Island Inst.*, 942 F. Supp. at 615. However, as detailed in section 5 below, the Court takes into consideration Defendant's argument that certain hours expended by the summer associates are unreasonable and excessive for the work performed.

4. Plaintiffs are Not Allowed Double-Recovery for Fees Already Awarded by this Court in Tyco I.

In *Tyco I*, this Court awarded Plaintiffs $3,728.75 in attorneys fees for the work associated with responding to Defendant's dilatory conduct in filing the *First Remand Results* and in conducting its investigation after the voluntary remand. *See Tyco I*, 259 F. Supp. 2d at 1250–53 ("Plaintiffs' counsel spent 48.1 hours working on their responses to Labor's two out of time requests. . . . At the hourly rates normally charged by Plaintiffs' counsel, the total attorney's fees amount to $7,457.50. . . . Although Plaintiffs' submitted fees are reasonable, the Court finds that other factors weigh in favor of reducing the amount of the sanctions against Defendant. . . . This Court awards attorney's fees to Plaintiffs in the amount of $3,728.75, one half of the amount requested." (internal citations omitted)). Defendant contends that Plaintiffs were compensated for this work when Labor complied with this Court's order to pay such fees. Def.'s Resp. at 28. Plaintiffs do not contest this fact and consent to a reduction in fees of $3,728.75 as already awarded. Pls.' Reply to Def.'s Resp. To Pls.' Application for Att'y's Fees and Expenses at 21. Therefore, the

Court directs that a reduction of $3,728.75 representing fees already awarded shall be reflected in the overall total granted to Plaintiffs.

5. The Hours Listed in the Proforma 1 and Proforma 2 Statements are Reasonable with the Exception of Certain Entries Discussed Below.

This Court finds that the hours requested in Plaintiffs' application are reasonable with the exception of the entries addressed below. Based on the inadequate work descriptions provided for the following entries, the Court declines to award fees for the hours claimed:

- 1.1 hours claimed for work by Mr. Benjamin R. Lindorf[3] on June 11, 2002 (Proforma 1 at 3 (no description provided for the hours worked));
- 0.2 hours claimed for work by Mr. Francisco Orellana on June 26, 2002 (Proforma 1 at 4 (description reads "DELETE"));
- 0.6 hours claimed for work by Mr. Francisco Orellana on April 14, 2003 (Proforma 1 at 9 (description reads "Review of Court's docket"));
- 5.9 hours claim for work performed by Mr. Benjamin R. Lindorf on November 20, 21, 24 and 25, 2003 (Proforma 1 at 11 (descriptions read "Prepare EJA proposal for settlement purposes"; "Prepare EIA Proposal for settlement purposes; send report letter to court"; "Prepare EIA Proposal for settlement purposes; send report letter to court"; "Prepare EIA Proposal for settlement purposes; send report letter to court; call client to give update"));
- 2.6 hours claimed for work performed by Mr. Jimmie Reyna on January 30, 2004 (Proforma 1 at 13 (description reads "Research"));
- 1.3 hours claimed for work performed by Mr. Francisco Orellana on April 12, 2004 (Proforma 2 at 4 (description reads "Attention to file")).

"An applicant must itemize fees and expenses <u>with sufficient specificity</u> to allow the court to determine what work is being claimed." *Traveler Trading Co. v. United States*, 713 F. Supp. 409, 415 (Ct. Int'l Trade 1989) (emphasis added) (citing Naporano Iron & Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987)). Courts have held that vague or ambiguous entries "render it difficult for the court to

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[3] In their brief, Plaintiffs note that Mr. Lindorf worked as a summer associate in 2002 and then joined the firm as an associate in September 2003. (Pls.' Br. at 21 n.3.) The Court takes this into consideration when making its adjustments to the fees requested.

ascertain the reasonableness of the hours billed." *Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321, 329 (D.C. Cir. 2004). Even when comparing these entries listed in Plaintiffs' Proforma statements against the docket of this case and the record before the Court, the Court is unable to determine what work is being claimed. Thus, this Court deducts 10.6 attorney hours (0.2 in 2002; 6.5 in 2003; 3.9 in 2004) and 1.1 summer associate hours (at the $115 per hour rate) from Plaintiffs' application for these inadequate entries.

The Court finds that the hours requested by Plaintiffs are reasonable for the tasks performed with the exception of the hours sought (1) in connection with drafting Plaintiffs' first 56.1 motion and (2) in connection with drafting Plaintiffs' application for fees under the EAJA. First, the Court finds that the summer associate hours sought in connection with the drafting of Plaintiffs' first 56.1 Motion are excessive. For the six weeks prior to filing Plaintiffs' first 56.1 brief, Plaintiffs' application lists 150.8 hours worked by summer associates in connection with drafting Plaintiffs' first 56.1 brief,[4] in ad-

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[4] The 150.8 hours listed for summer associates in connection with drafting the 56.1 brief are as follows: 0.5 hours of work performed by Mr. Benjamin R. Lindorf on May 21, 2002 (description reads "Began preliminary work on standards of proof and eligibility determination for TAA [ ]."); 1.5 hours of work performed by Mr. Benjamin R. Lindorf on May 28, 2002 (description reads "Research statutory requirements for [TAA] under NAFTA implementation."); 6.5 hours of work performed by Mr. Benjamin R. Lindorf on May 29, 2002 (description reads "Researched the standards of review for agency determination of NAFTA-TAA; began outline on findings."); 3.2 hours of work performed by Mr. Benjamin R. Lindorf on June 7, 2002 (description reads "Began work on brief - outlined format for brief (motion for judgment on agency record) and wrote introduction and standard of review."); 3.1 hours of work performed by Mr. Benjamin R. Lindorf on June 10, 2002 (description reads "Drafted statement of the case, reviewed administrative record (public version); did preliminary research on 2-step production shifts."); 6.2 hours of work performed by Mr. Benjamin R. Lindorf on June 17, 2002 (description reads "Research pointed arguments on brief; met with J. Reyna to go over argument structure; research case law."); 4.8 hours of work performed by Mr. Benjamin R. Lindorf on June 19, 2002 (description reads "Research other databases, began memorandum drafting data table from Tyco DOL research."); 4.8 hours of work performed by Mr. Benjamin R. Lindorf on June 20, 2002 (description reads "Finished Tyco data; preliminary analysis; contacted DOL to see about accessing records; statute or case review; began argument section of brief."); 8.1 hours of work performed by Mr. Benjamin R. Lindorf on June 21, 2002 (description reads "Research case law and agency determinations."); 7.2 hours of work performed by Mr. Benjamin R. Lindorf on June 24, 2002 (description reads "Worked with J. Minarczik on project; finished outline; meeting with J. Minarczik and F. Orellana."); 6.0 hours of work performed by Ms. Jennifer A. Minarczik on June 24, 2002 (description reads "Research for NAFTA-TAA brief; develop outline for Part II. Research "substantial evidence" and legislative history; meeting with B. Lindorf & F. Orellana."); 7.5 hours of work performed by Mr. Benjamin R. Lindorf on June 25, 2002 (description reads "Completed first draft of argument section."); 9.3 hours of work performed by Ms. Jennifer A. Minarczik on June 25, 2002 (description reads "Research and draft Part II of NAFTA-TAA brief; consolidate Parts with B. Lindorf; create new outline; meet with J. Reyna for approval and direction."); 13.7 hours of work performed by Mr. Benjamin R. Lindorf on June 26, 2002 (description reads "Merged briefs and completely finished 2nd draft with J. Minarczik."); 13.3 hours of work performed by Ms. Jennifer A. Minarczik on June 26, 2002 (description reads "Continue research on NAFTA-TAA memo. Revise statement of facts, create table of contents, cross-check rules, revise/create confidential record."); 15.1 hours of work performed by Mr. Benjamin R. Lindorf on June 27, 2002 (description

dition to the 45.7 hours listed for attorney work on the brief.[5] Proforma 1 at 3–5. The Court finds that the summer associate hours requested in connection with the drafting of Plaintiffs' first 56.1 brief to be unreasonable. The Court reduces the summer associate hours awarded for this work by half; thus, the Court deducts 75.4 hours from those requested for summer associates in Plaintiffs' application.

Second, the Court finds that the total hours requested for work on Plaintiffs' EAJA brief is also excessive. Plaintiffs' Proforma statements indicate that Plaintiffs' counsel worked 100.1 hours on drafting the EAJA brief, including 67.9 attorney hours[6] and 38.5 summer

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reads "Third draft of brief."); 11.4 hours of work performed by Ms. Jennifer A. Minarczik on June 27, 2002 (description reads "Revise brief; work on table of authorities; draft conclusion; rule 51 statement."); 14.2 hours of work performed by Mr. Benjamin R. Lindorf on June 28, 2002 (description reads "Hawks - final draft and filed copy."); 14.4 hours of work performed by Ms. Jennifer A. Minarczik on June 28, 2002 (description reads "Finish brief for filing in Court of International Trade. Create Table of Contents, revise.").

[5] The 45.7 hours listed for attorneys in connection with drafting the 56.1 brief are as follows: 1.8 hours of work performed by Mr. Francisco Orellana on June 11, 2002 (description reads "Meeting w/summer associate Lindorf to strategize and draft brief; research for brief."); 1.0 hours of work performed by Mr. Francisco Orellana on June 12, 2002 (description reads "Meeting w/partner to review strategy for brief, review results to date."); 2.4 hours of work performed by Mr. Jimmie Renya on June 17, 2002 (description reads "Attention to 56.1 brief."); 0.7 hours of work performed by Mr. Francisco Orellana on June 17, 2002 (description reads "Analysis of TAA issues for court case."); 2.4 hours of work performed by Mr. Jimmie Reyna on June 18, 2002 (description reads "56.1 Brief"); 3.7 hours of work performed by Mr. Francisco Orellana on June 20, 2002 (description reads "Review and analysis of ITC data for fiber optics; review and analysis of cases."); 3.6 hours of work performed by Mr. Francisco Orellana on June 21, 2002 (description reads "Meeting with summer associate; preparation for brief; analysis of cases; analysis of Federal Register Notices."); 2.4 hours of work performed by Mr. Jimmie Reyna on June 24, 2002 (description reads "Attention to Brief."); 2.3 hours of work performed by Mr. Francisco Orellana on June 24, 2002 (description reads "Review and analysis of record; draft of outline and meeting with summer associates regarding draft to brief."); 3.5 hours of work performed by Mr. Jimmie Reyna on June 25, 2002 (description reads "Attention to, review results to date; assign tasks; 56.1 Brief."); 4.6 hours of work performed by Mr. Jimmie Reyna on June 27, 2002 (description reads "Attention to Brief 56.1, review drafts, male changes."); 3.5 hours of work performed by Mr. Francisco Orellana on June 27, 2002 (description reads "Redlining for document; research of cases concerning substantial evidence."); 5.0 hours of work performed by Mr. Jimmie Reyna on June 28, 2002 (description reads "56.1 Brief"); 8.8 hours of work performed by Mr. Francisco Orellana on June 28, 2002 (description reads "Research and analysis of cases; draft of order; memorandum and motion; organization of brief; drafting of public version; delivery to post office; APO compliance.").

[6] Plaintiffs' statements reflect that counsel spent 17 hours in 2003 and 50.9 hours in 2004 working on the EAJA application. (Proforma 1 at 9–10, 12; Proforma 2 at 3–4.) The 17 hours listed in connection with drafting the EAJA application in 2003 are as follows: 2.5 hours of work performed by Mr. Francisco Orellana on July 30, 2003 (description reads "Review of Federal Circuit case and preparation for drafting application for fees."); 1.9 hours of work performed by Mr. Francisco Orellana on July 31, 2003 (description reads "Meeting with summer associate Brad Nowak to discuss assignment on application for attorney's fees; review of information."); 2.4 hours of work performed by Mr. Francisco Orellana on August 1, 2003 (description reads "Research and review of cases concerning application of EAJA funds."); 1.6 hours of work performed by Mr. Francisco Orellana on August 4, 2003 (description reads "Review draft of application for EAJA funds."); 1.6 hours of work performed by Mr. Francisco Orellana on August 5, 2003 (description reads "Review of draft of

associate hours.[7] Although fees are generally allowed for preparation of the EAJA application, *see Keely v. Merit Systems Protection Bd.*, 793 F.2d 1273, 1275 (Fed. Cir. 1986) ("[Plaintiff] is entitled to an

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application for EAJA funds."); 1.8 hours of work performed by Mr. Francisco Orellana on August 6, 2003 (description reads "Review of draft of application for EAJA funds."); 1.6 hours of work performed by Mr. Francisco Orellana on August 7, 2003 (description reads "Attention to EAJA brief."); 0.6 hours of work performed by Mr. Francisco Orellana on August 8, 2003 (description reads "Attention to EAJA brief."); 1.6 hours of work performed by Mr. Francisco Orellana on August 11, 2003 (description reads "Editing of EAJA brief."); 0.9 hours of work performed by Mr. Francisco Orellana on August 12, 2003 (description reads "Editing of EAJA brief; report to partner on EAJA application."); 0.5 hours of work performed by Mr. Francisco Orellana on December 12, 2003 (description reads "Analysis of issues concerning EAJA fees and preparation of status of case for Court.").

The 50.9 hours listed in connection with drafting the EAJA application for 2004 are as follows: 1.8 hours of work performed by Mr. Francisco Orellana on February 12, 2004 (description reads "Research EAJA.");1.9 hours of work performed by Mr. Francisco Orellana on February 13, 2004 (description reads "Attention to brief for EAJA.")); 1.1 hours of work performed by Mr. Benjamin R. Lindorf on February 18, 2004 (description reads "Update EAJA brief with new cases and new facts."); 1.6 hours of work performed by Mr. Francisco Orellana on February 18, 2004 (description reads "Review of brief for attorney's fees."); 0.2 hours of work performed by Mr. Benjamin R. Lindorf on February 19, 2004 (description reads "Update EAJA brief with new cases and new facts."); 1.7 hours of work performed by Mr. Francisco Orellana on February 19, 2004 (description reads "Research on attorney's fees under EAJA and inclusion of new cases into brief."); 1.9 hours of work performed by Mr. Francisco Orellana on April 2, 2004 (description reads "Attention to file; telephone conference with client; and initial preparation for EAJA brief."); 2.3 hours of work performed by Mr. Francisco Orellana on April 5, 2004 (description reads "Research, draft, edit EAJA brief."); 1.7 hours of work performed by Mr. Francisco Orellana on April 8, 2004 (description reads "Research, draft, edit EAJA brief."); 2.1 hours of work performed by Mr. Francisco Orellana on April 9, 2004 (description reads "Research, draft, edit EAJA brief; telephone conference with Ms. Hamilton; attention to litigation file."); 6.0 hours of work performed by Mr. Jimmie Reyna on April 11, 2004 (description reads "Draft, edit EAJA brief."); 5.6 hours of work performed by Mr. Jimmie Reyna on April 13, 2004 (description reads "Draft, edit EAJA brief."); 1.8 hours of work performed by Mr. Francisco Orellana on April 13, 2004 (description reads "Research on Equal Justice Act."); 4.5 hours of work performed by Mr. Jimmie Reyna on April 14, 2004 (description reads "Draft, edit EAJA brief."); 2.7 hours of work performed by Mr. Francisco Orellana on April 15, 2004 (description reads "Research, draft, edit EAJA brief."); 0.5 hours of work performed by Mr. Francisco Orellana on April 16, 2004 (description reads "Research, draft, edit EAJA brief."); 1.8 hours of work performed by Mr. Francisco Orellana on April 20, 2004 (description reads "Research on CIT cases involving EAJA fees.")); 1.1 hours of work performed by Mr. Francisco Orellana on April 21, 2004 (description reads "Research on Federal cases involving EAJA fees."); 1.8 hours of work performed by Mr. Jimmie Reyna on April 22, 2004 (description reads "Review progress on EAJA brief."); 1.0 hours of work performed by Mr. Francisco Orellana on April 22, 2004 (description reads "Research on cases involving attorney's fees."); 0.9 hours of work performed by Mr. Francisco Orellana on April 23, 2004 (description reads "Attention to file and EAJA brief."); 0.8 hours of work performed by Mr. Jimmie Reyna on April 27, 2004 (description reads "Outline EAJA strategies."); 2.1 hours of work performed by Mr. Francisco Orellana on April 27, 2004 (description reads "Attention to legislative intent on EAJA."); 2.5 hours of work performed by Mr. Francisco Orellana on April 28, 2004 (description reads "Attention to and review cases for EAJA brief."); 1.5 hours of work performed by Mr. Francisco Orellana on April 29, 2004 (description reads "Attention to cases on EAJA brief.").

[7] The 38.5 hours listed for summer associates in connection with drafting the EAJA application are as follows: 3.0 hours of work performed by Mr. Brad Nowak on July 30, 2003 (description reads "Reviewed CIT materials, researched Westlaw for cases related to the recovery of pro bono claims under EAJA. Researched CIT cases for EAJA recovery."); 7.0 hours of work performed by Mr. Brad Nowak on July 31, 2003 (description reads "Reviewed CIT materials, researched Westlaw for cases related to the recovery of fees for specialized

award of attorney fees and expenses . . . including fees and expenses for preparing the application under the EAJA." (citation omitted)); *Devine v. Sutermeister*, 733 F.2d 892, 899 (Fed. Cir. 1984) ("[The Government] concedes that the time spent drafting the EAJA fee application is recoverable if [the plaintiff] is otherwise entitled to recover." (citations omitted)), the Court finds that the hours requested are unreasonable for the task performed. The fees sought for preparing Plaintiffs' EAJA application are approximately one-sixth of the total fees requested.[8] The Court finds this to be excessive for the twenty-five page memorandum plus attachments that was filed in support of Plaintiffs' application. Therefore, the Court exercises its discretion to deduct one-third of the 67.9 attorney hours requested for preparing Plaintiffs' EAJA application: 22.63 hours (6.78 in 2003; 15.85 in 2004).

6. Plaintiffs are Entitled to Recover Fees for the Work Performed After Certification and Before a Final Judgment was Entered in This Case.

Sixth, the Court holds that Plaintiffs are entitled to recover fees for the work performed after certification and before a final judgment was entered in this case. Contrary to Defendant's contentions, the fees requested by Plaintiffs for work performed after June 25, 2003, the day on which Labor certified Plaintiffs, does not reflect "post-judgment activity." *See* Def.'s Resp. at 25. Rather, the final judgement in this case was entered on April 14, 2004, pursuant to proposed judgment orders submitted by the parties on March 19, 2004, and March 26, 2004. After the Plaintiffs were certified, Plaintiffs counsel drafted Plaintiffs EAJA application, which, as discussed above, is compensable activity under the EAJA, and worked with Defendant's counsel to reach an agreement regarding the final judg-

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counsel; drafted memorandum in support of attorney fees under EAJA. Reviewed CIT cases and Court of Appeals cases for specialized attorney fee."); 4.2 hours of work performed by Mr. Brad Nowak on August 1, 2003 (description reads "Researched Westlaw for cases related to the recovery of fees for substantial justification; edited draft memorandum in support of fees."); 7.3 hours of work performed by Mr. Brad Nowak on August 4, 2003 (description reads "Edited draft memorandum, corrected citations, shepardized current cited cases, reviewed recent CIT."); 5.3 hours of work performed by Mr. Brad Nowak on August 5, 2003 (description reads "Edited draft memorandum, corrected citations, reviewed Court of Appeals cases which granted fees."); 4.5 hours of work performed by Mr. Brad Nowak on August 6, 2003 (description reads "Edited draft memorandum, edited record citations, reviewed EAJA filing form."); 5.5 hours of work performed by Mr. Brad Nowak on August 7, 2003 (description reads "Edited draft memorandum, called CIT for docket materials, reviewed EAJA annotations, research Rule 16 and EAJA recovery."); 1.7 hours of work performed by Mr. Brad Nowak on August 8, 2003 (description reads "Shepardized cases, cite checked, edited corrected memo.").

[8] Plaintiffs request $119,966.50 in fees. (Pls.' Br. at 22.) Using Plaintiffs' hourly rates, the fees associated with preparing Plaintiffs' EAJA application total $18,966.50. (*See* Proforma 1 at 9–10, 12; Proforma 2 at 3–4) (accounting for 18.7 hours at $365 per hour; 30.9 hours at $180 per hour; 17 hours at $160 per hour; 1.3 hours at $155 per hour; and 38.5 hours at $95 per hour).)

ment to be entered in this case. The Court holds that such work is not precluded from recovery under the EAJA. However, the Court declines to award the full amount of fees requested for work performed after Labor certified Plaintiffs. First, the Court finds that the 10.2 hours worked by Mr. Francisco Orellana on reviewing Labor's *Second Remand Results* and drafting Plaintiffs' one paragraph response to be excessive for the task performed.[9] The Court exercises its discretion and deducts one-half of the hours requested, 5.1 hours, from the award. The Court also declines to award fees for 2.7 hours of worked performed after this Court entered final judgment in this case.[10] While acknowledging that some types of post-judgment activity are compensable as necessarily tied to the initial case, this Court finds time spent reviewing the underlying decision was not necessary to prepare the case at hand. *Jenkins by Jenkins v. Mo.*, 127 F.3d 709, 716–17 (8th Cir. 1997) ("Some types of post-judgment activities are readily seen to be necessary adjuncts to the initial litigation, whereas other types of activites are more like a new, separate lawsuit and require a fee determination independent of the underlying case.")

E. Final Calculation of Fees and Expenses Awarded.

Plaintiffs' statements reflect 707.8 hours worked: 479.7 hours for attorneys; 219.7 hours for summer associates; and 8.4 for paralegals. *See* Proforma 1; Proforma 2. The 138 attorney hours claimed in 2002 are reduced by the 43 hours already compensated for in *Tyco I* for work performed that year, and reduced by the 0.2 hours for inadequate descriptions in the entries. The 200.3 attorney hours claimed in 2003 are reduced by the 12.5 hours already compensated for in *Tyco I* for work performed that year, 6.5 hours for inadequate descriptions in the entries, and 6.78 hours for excessive fees for Plaintiffs' EAJA application. The 141.4 attorney hours claimed in 2004 are reduced by 3.9 hour for inadequate descriptions in the entries, 15.85 hours for excessive fees for Plaintiffs' EAJA application; 5.1 hours for excessive hours regarding Plaintiffs' response to Labor's *Second Remand Results*, and 2.7 hours for noncompensable post-

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[9] *See* Proforma 1 at 9 (1.9 hours of work on July 10, 2004 (description reads "Review of Labor's Revised Remand Determination; report to Jimmie Reyna on Labor's papers")); (2.8 hours of work on July 15, 2004 (description reads "Preparation of Response to Labor's Revised Determination Remand")); (1.9 hours of work on July 18, 2004 (description reads "Drafting of Response to Defendant's Revised Determination on Remand")); (1.3 hours of work on July 21, 2004 (description reads "Editing of Response to Defendant's Revised Determination on Remand")); (2.3 hours of work on July 25, 2004 (description reads "Editing of clients' response to Labor's Revised Determination on Remand. Drafting of letter and certificates to CIT. Filing of document").

[10] *See* Proforma 2 at 4 (1.2 hours of work performed by Mr. Jimmie Reyna on April 14, 2004 (description reads "Review and analyze Court's decision") (1.5 hours of work performed by Mr. Francisco Orellana on April 14, 2004 (description reads "Attention to decision rendered by court")).)

judgment work. The 38.5 summer associate hours claimed at the $95 per hour rate stand. The 181.2 summer associate hours claimed at the $115 per hour rate are reduced by 1.1 hours for inadequate descriptions in the entries and reduced by 75.4 hours for excessive fees relating to the first 56.1 brief. The 1 hour of paralegal work claimed at $100 per hour stands. The 7.4 hours of paralegal work claimed at $95 per hour are reduced by the 1.3 hours already compensated in *Tyco I*. The following chart reflects the final fee calculations:

Topic	**Hours Claimed**	**Hours Deducted**	**Hours Allowed**	**Rate**	**Fee Allowed**
Attorney Hours 2002	138	<43.2>	94.8	$151.09	$14323.33
Attorney Hours 2003	200.3	<25.78>	174.52	$155.35	$27111.68
Attorney Hours 2004	141.4	<27.55>	113.85	$158.70	$18067.99
Summer Associate Fees at $95 per hour	38.5	<0>	38.5	$95.00	$3657.50
Summer Associate Fees at $115 per hour	181.2	<76.5>	104.7	$115.00	$12040.50
Paralegal Fees at $95 per hour	7.4	<1.3>	6.1	$95.00	$579.50
Paralegal Fees at $100 per hour	1	<0>	1	$100.00	$100.00
TOTAL	707.8	<174.33>	533.47		$75880.50

Although this Court declines to award post-judgment fees for reviewing the underlying decision, see section D.6, the attorney's fees of $27.20 associated with this case are compensable. *Schuenemeyer v. United States*, 776 F.329, 333 (Fed. Cir. 1985) (holding attorney fees incurred in the preparation of an application for fees compensable under the EAJA). The reasonableness of Plaintiffs' claimed expenses is not challenged: the Court awards the full $27.20 claimed. The Court arrives at a final award of $75,907.70.

CONCLUSION

This Court holds that Plaintiffs' application for fees and expenses under the EAJA meets the necessary requirements and is granted because Defendant's position in this litigation was not substantially justified and no other reasons make an award unjust. *See* 28 U.S.C.

§ 2412(d). This Court awards attorney fees based upon the statutory cap of $125 per hour with a cost of living adjustment, and declines to award any fees for certain unreasonable and excessive entries included in Plaintiffs' application as detailed above. Plaintiffs are awarded $75,907.70 for fees and expenses under the EAJA.

Slip Op. 04–120

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NSK LTD., NSK EUROPE LTD., NSK BEARINGS EUROPE LTD., NSK CORPORATION and NSK PRECISION AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Court No. 04–00413

Pursuant to USCIT R. 65(a) and (b), NSK Ltd., NSK Europe Ltd., NSK Bearings Europe Ltd., NSK Corporation and NSK Precision America, Inc. (collectively, "NSK") request a preliminary injunction and temporary restraining order, respectively. NSK seeks to temporarily restrain and then enjoin the fifteenth administrative reviews of the antidumping duty order on ball bearings and parts thereof from Japan and the United Kingdom covering the period of May 1, 2003, through April 30, 2004. Defendants move for a dismissal pursuant to USCIT R. 12(b)(1) and 28 U.S.C. § 1581 (2000) for lack of subject matter jurisdiction. On September 15, 2004, the Court heard oral argument to determine whether a temporary restraining order and preliminary injunctive relief are appropriate.

Held: NSK's motion for a temporary restraining order and preliminary injunctive relief is denied because NSK has not sufficiently demonstrated that the elements required for such relief have been met. Defendant's motion for dismissal for lack of subject matter jurisdiction is granted.

Dated: September 20, 2004

Crowell & Moring LLP (*Robert A. Lipstein*, *Matthew P. Jaffe*, *Alexander H. Schaefer*) for NSK Ltd., NSK Europe Ltd., NSK Bearings Europe Ltd., NSK Corporation and NSK Precision America, Inc., plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael D. Panzera*); of counsel: *Peter Kirchgraber*, *Elizabeth Cooper Doyle*, *Philip Curtin*, *Arthur Sidney*, 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*, *Eric P. Salonen*) for Timken U.S. Corporation, defendant-internevor.

OPINION

TSOUCALAS, Senior Judge: Pursuant to USCIT R. 65(a) and (b), NSK Ltd., NSK Europe Ltd., NSK Bearings Europe Ltd., NSK Corporation and NSK Precision America, Inc. (collectively, "NSK") request a preliminary injunction and temporary restraining order, respectively. NSK seeks to temporarily restrain and then enjoin the fifteenth administrative reviews of the antidumping duty order on ball bearings and parts thereof from Japan and the United Kingdom covering the period of May 1, 2003, through April 30, 2004. Defendants move for a dismissal pursuant to USCIT R. 12(b)(1) and 28 U.S.C. § 1581 (2000) for lack of subject matter jurisdiction. On September 15, 2004, the Court heard oral argument to determine whether a temporary restraining order and preliminary injunctive relief are appropriate.

Background

On May 15, 1989, Commerce published antidumping duty orders covering anti-friction bearings (other than tapered roller bearings) and parts thereof ("AFBs") from various countries, including Japan and the United Kingdom. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (May 15, 1989). NSK's complaint concerns the fifteenth administrative reviews of those orders which began on June 30, 2004, and cover the period of May 1, 2003 through April 30, 2004. *See* Compl. ¶15. During the first administrative reviews of AFBs, Commerce implemented a bearing-family averaging methodology (the "Family Approach") for model matching. *See Final Results of Antidumping Duty Administrative Reviews for Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et. al.*, 57 Fed. Reg. 28,360, 28,364–65 (June 24, 1992). Under this approach, similar merchandise is matched based on eight criteria including model design, physical dimension and precision rating. *See* Mem. Supp. Mot. T.R.O. Prelim. Inj. ("NSK's Mem.") at 2.

During the second and third administrative reviews, The Torrington Company challenged this model matching approach. *See id.* at 2. The Court, however, upheld Commerce's use of the Family Approach. *See Torrington Co. v. United States*, 19 CIT 403, 412–14, 881 F. Supp. 622, 633–35 (1995). During the fourteenth administrative reviews for AFBs, Commerce was asked by the Timken U.S. Corporation ("Timken") to change its Family Approach in favor of a new model matching methodology. *See* App. Mem. Supp. Mot. T.R.O. Prelim. Inj. ("NSK's App.") Ex. 18. Commerce, however, declined to change its model matching methodology for the fourteenth review stating that it did not have conclusive evidence that changes to its model matching methodology would yield more accurate results. *See* *id.*, Ex. 20 at 3. Commerce remarked that the "suggested changes, or a variant thereof, [to its methodology] might yield more accurate results," but recommended that it first analyze the issue further. *Id.*

On December 3, 2003, Commerce determined that a change to its model match methodology for AFBs was warranted. *See id.*, Ex. 21 at 2–5. Commerce notes that the Family Approach considers all models within a family to be equally similar. *See id.* at 3. This methodology deviates from its normal practice of searching the home market sales of subject merchandise for the single most similar model that can be compared. *See id.* at 3–4. Commerce determined that technological changes since the implementation of the Family Approach have lifted the time and cost restraints on the number of matches Commerce can make on an individual basis. *See id.* Based on these reasons, Commerce determined that it would "re-examine the model-matching methodology [it] use[s] in administrative reviews of these antidumping duty orders with a view to revising the methodology in a manner commensurate with the current level of technology." *Id.* at 4. Commerce determined that it lacked sufficient time to implement any changes and, therefore, used the Family Approach for the fourteenth review of AFBs. *See id.* at 5. Commerce stated that it would solicit comments and rebuttal comments "on all the physical characteristics and their importance in order to develop an accurate and precise model-match methodology in which [Commerce] would select the single most similar model based on all relevant physical characteristics." *Id.* at 7. On February 2, 2004, and February 17, 2004, NSK filed comments and rebuttal comments, respectively, about model matching criteria with Commerce. *See* NSK's Mem. at 5.

On June 30, 2004, Commerce initiated the fifteenth administrative reviews of the antidumping duty orders covering ball bearings and parts thereof from Japan and the United Kingdom. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 Fed. Reg. 39,409 (June 30, 2004). On July 2, 2004, Commerce issued a memorandum discussing the rationale for its determination to reassess its model match methodology for the fifteenth administrative reviews. *See* NSK's App. Ex. 24. Commerce stated its intention to use the revised model matching methodology, but also indicated that it may alter the methodologies depending on comments received or data collected during the fifteenth administrative reviews. *See id.* at 1. On July 7, 2004, Commerce issued questionnaires to all respondents, including NSK. *See* NSK's Mem. at 5. On August 23, 2004, NSK filed this action requesting a temporary restraining order and a preliminary injunction suspending the fifteenth administrative reviews during the pendency of this action. Commerce thereafter filed a motion to dismiss for lack of subject matter jurisdiction.

DISCUSSION

I. NSK Has Failed to Meet the Requirements for the Issuance of a Temporary Restraining Order and Preliminary Injunction

Injunctive relief is an "extraordinary remedy," which is to be granted sparingly. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). In order to obtain a preliminary injunction, NSK bears the burden of demonstrating that (1) it has a likelihood of success on the merits; (2) absent relief, there is a threat of immediate and irreparable harm to NSK; (3) the balance of hardships to the parties favors issuance of the preliminary injunction; and, (4) the public interest would be better served by a grant of the relief requested. *See Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1555 (Fed. Cir. 1994); *see also Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). In analyzing these factors, the Court employs a "sliding scale," *see Chilean Nitrate Corp. v. United States*, 11 CIT 538, 539 (CIT 1987), and is not required to assign equal weight to each factor. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). After considering the requisite factors, the Court finds that NSK has failed to demonstrate that it is entitled to the requested relief.

A. Likelihood of Success on the Merits

NSK argues that Commerce's new model match methodology and its retroactive application of this methodology to the fifteenth administrative reviews of AFBs is unlawful. *See* NSK's Mem. at 12–26. Specifically, NSK complains that it detrimentally relied on Commerce's Family Approach and that Commerce's explanation for changing methodologies is not supported by substantial evidence and in accordance with law. *See id.* at 12–20. The Court agrees with NSK that Commerce may not alter its methodology which has been relied upon by a respondent without explaining the basis for the change and demonstrating that such change is supported by substantial evidence and in accordance with law. *See* NSK's Mem. at 12; *see also Ashan Iron & Steel Co., Ltd v. United States*, 2003 Ct. Intl. Trade LEXIS 109, *19–20 (CIT July 16, 2003). An agency, however, is provided ample latitude to adopt new rules and policies depending on the circumstances that arise. *See Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991).

Agency statements provide guidance to regulated industries. " 'An [agency] announcement stating a change in the method . . . is not a general statement of policy.' " *American Trucking Ass'ns, Inc. v. ICC*, 659 F.2d 452, 464 n.49 (5th Cir. 1981) (quoting *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) (internal quotations omitted)). While a policy denotes "the *general principles* by which a government is guided" by laws, BLACK'S LAW DICTIONARY 1178 (7th ed. 1999) (emphasis added), methodology refers only to the "*mode* of organizing, operating or performing something, especially to achieve [the goal of a statute]." *Id.* at 1005 (defining mode) (emphasis added). *Accord Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Interstate Natural Gas Ass'n of Am. v. Federal Energy Regulatory Comm'n*, 716 F.2d 1 (D.C. Cir. 1983); *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976). Consequently, the courts are even less in the position to question an agency action if the action at issue is a choice of methodology, rather than policy. *See, e.g., Maier, P.E. v. United States Envtl. Prot. Agency*, 114 F.3d 1032, 1043 (10th Cir. 1997) (citing *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983)). Similarly, an agency decision to change its methodology, that is, to take an act of statutory implementation while pursuing the same policy, should be examined under the *Chevron* test and sustained if the new methodology is reasonable. *See, e.g., Koyo Seiko Co. v. United States*, 24 CIT 364, 373–74, 110 F. Supp. 2d 934, 942 (2000) (stating that " 'the use of different methods [of] calculati[on] . . . does not [mean there is a] conflict with the statute' ") (quoting *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995)).

In the case at bar, NSK has failed to demonstrate that it will succeed on the merits. While Commerce has indicated its intention to abandon the Family Approach and adopt a new model match method, *see* NSK's App. Ex. 21 at 5–7, Commerce has not made its final determination as to what methodology it will use in the fifteenth administrative reviews.[1] In addition, Commerce has only begun collecting data to aid in determining what methodology will be used. Furthermore, Commerce is not precluded from considering a change in its methodology in a continuing review. Prior to the implementation of its decision to change a methodology, Commerce is required to provide the parties affected by the change a final opportunity to comment before the final determination is issued. *See* 19 U.S.C § 1677m(g) (2000). Here, Commerce has not given interested parties an opportunity to comment on the proposed methodology nor has Commerce issued a final determination. The lack of a final determination and evidentiary record precludes a determination as to whether Commerce's new methodology, if indeed it adopts this new methodology, is reasonable. Accordingly, the Court finds that NSK has failed to carry its burden and demonstrate that it is likely to succeed on the merits.

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[1] NSK argues that Commerce has made such a final determination by not requesting Family Approach data in its questionnaires sent to interested parties in July 2004. *See* NSK's Reply Mem. Supp. Mot. T.R.O. Prelim. Inj. at 3. The Court notes, however, that while questionnaires may be indicative of Commerce's intentions, they lack the authority and decisiveness of a final determination.

B. Immediate and Irreparable Harm

NSK asserts that it will face immediate and irreparable harm if injunctive relief is not granted. *See* NSK's Mem. at 26–31. Specifically, NSK maintains that it will not be able to apply its safe pricing system because "Commerce's model match methodology lies at the very heart of this system." *Id.* at 26. Consequently, NSK asserts that without the requested relief it will lose its right to purge itself of antidumping duty liabilities. *See id.* at 26–28. NSK's inability to apply a safe pricing system "is not a mere economic injury, but rather the loss of its right to obtain effective judicial review of Commerce's wrongful act so it can rid itself of antidumping liabilities." *Id.* at 27. NSK notes that it may withdraw from the fifteen administrative reviews of AFBs on or before September 28, 2004. *See id.* at 29. NSK contends that if it withdraws from the reviews it will lose its "right to judicial review of Commerce's unlawful abandonment of the [F]amily [A]pproach." *Id.* at 30. NSK maintains that without the requested relief it will incur costs related with complying with Commerce's new methodology. *See id.* at 31. NSK asserts that the costs of "complying with Commerce's illicit retroactive application of its new model-match methodology to the AFB15 reviews are significant," *id.*, because NSK is unable to price its AFBs "safely." *See* NSK's App. Ex. 26 ¶¶21, 22, 23.

To establish irreparable harm, NSK bears an extremely heavy burden because the harm must be the type of injury that is serious and cannot be undone. *See Shandong Huarong Gen. Group Corp. v. United States*, 24 CIT 1286, 1289–90, 122 F. Supp.2d 1367, 1369–70 (2000). NSK must show a presently existing threat and not just the mere possibility of injury. *See id.* Here, NSK has failed to sufficiently demonstrate that it will be irreparably harmed without a preliminary injunction. NSK asserts that without injunctive relief "it will invariably lose sales that cannot be regained; customers that cannot be recaptured; and profits that cannot be recovered." *See* NSK's Mem. at 27. The Court has held that "the harm [that] is irreparable cannot be determined by surmise." *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F. Supp. 2d 1324, 1331 (2001). NSK's allegations are speculative because Commerce has not rendered a final determination as to which methodology will be used for the final results. Commerce has neither accepted or rejected with finality the use of a new model match methodology. Accordingly, the Court finds that NSK has failed to demonstrate that it will be irreparably harmed if injunctive relief is denied.

Because the Court finds that NSK has failed to demonstrate that it will succeed on the merits and that it will face immediate irreparable harm, it is not necessary to examine the remaining two factors in depth. *See FMC Corp.*, 3 F.3d at 427 (stating that "[t]he absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial" of a preliminary injunction). NSK asserts that injunctive relief would serve the public interest by ensuring the fair and accurate administration of the antidumping duty statute and preserving NSK's right to judicial review. *See* NSK's Mem. at 32–33. NSK also argues that the balance of hardship warrants the granting of injunctive relief and "would best preserve the Court's power to decide this case and award an effective remedy, without imposing an excessive burden on Commerce." *Id.* at 34. The Court finds that neither the public interest nor the balance of hardship weigh in favor of granting a preliminary injunction. NSK may seek meaningful judicial review when Commerce has issued its final determination. At this juncture in the proceeding, Commerce has just begun to collect data and formulate its model matching methodology. The Court agrees with Timken that "NSK's interlocutory action to stop Commerce from doing what the law requires it to do merely delays the final results, and delays any potential for judicial review based on the complete record." Timken U.S. Corp. Mem. Opp'n NSK's Mot. Injunctive Relief at 24. Accordingly, the Court denies NSK's motion for a temporary restraining order and preliminary injunction.

II. NSK Has Failed to Demonstrate that the Court has Jurisdiction Under 28 U.S.C. § 1581(i)

In the case at bar, the Court notes that NSK's time to file a response to Commerce's motion pursuant to USCIT R. 12(b)(1) does not expire until October 4, 2004. At oral arguments held on September 15, 2004, however, the parties addressed whether the Court has jurisdiction under 28 U.S.C. § 1581(i). Based on the arguments put forth by the parties during this hearing, the Court is unpersuaded by NSK's argument that jurisdiction exists. In matters involving the antidumping duty laws, the Court has jurisdiction under 28 U.S.C. § 1581(c). Under certain circumstances, however, 28 U.S.C. § 1581(i), the residual jurisdiction provision, confers exclusive jurisdiction upon the Court concerning issues relating to the antidumping duty law which are not specifically covered by other subparagraphs of section 1581.[2] The residual jurisdiction provision may also be invoked when the remedy provided by another subsection would be "manifestly inadequate." *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *ac-*

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[2] The statute states in pertinent part that "[t]his subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930. . . ." 28 U.S.C. § 1581(i). Section 516A(a) of the Tariff Act of 1930 provides that within 30 days after the date of publication in the Federal Register of the final results of an administrative review conducted by Commerce, a party to the proceeding "may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint . . . contesting any factual findings or legal conclusions upon which the determination is based." 19 U.S.C. § 1516a(a)(2)(A) (2000).

cord Norcal/Crosetti Foods, Inc. v. United States, 963 F.2d 356, 359 (Fed. Cir. 1992). To invoke jurisdiction under 28 U.S.C. § 1581(i), the plaintiff bears "the burden of proving the requisite jurisdictional facts to establish the court's jurisdiction." *Elkem Metals Co. v. United States*, 23 CIT 170, 175, 44 F. Supp. 2d 288, 292 (1999). The Court finds that NSK has failed to demonstrate that the residual jurisdiction provision applies in this case.

NSK argues that jurisdiction under 28 U.S.C. § 1581(c) is "manifestly inadequate with respect to this matter." NSK's Mem. at 9. NSK asserts that this matter is ripe for judicial review because it "has already tried in the context of the AFB15 reviews to convince Commerce to keep the [F]amily [A]pproach," and Commerce has rejected NSK's arguments. *Id.* at 10. NSK maintains that without immediate judicial relief it will sustain irreparable injuries and, therefore, relief afforded under 28 U.S.C. § 1581(c) is manifestly inadequate. *See id.* at 10–11. NSK argues that Commerce has collected comments with respect to the fifteenth administrative reviews and the appropriate model matching methodology. *See id.* at 10. NSK also contends that Commerce has made its final determination to not use the Family Approach and any attempt by NSK to get Commerce to change its position would be futile. *See id.* Commerce, however, has not issued its final determination. In essence, NSK requests the Court to exercise jurisdiction to decide an issue that involves interim decision-making by Commerce.

The Court's jurisdiction involving such decisions by Commerce, however, is not broad. *See MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 332–33 (1992). In the instances where residual jurisdiction has been found for interim decisions, jurisdiction was invoked because plaintiffs would have been denied relief if required to wait for Commerce's final determination prior to seeking judicial review. *See id.* (discussing several instances in which the Court has found jurisdiction for interim decisions). Here, if required to await Commerce's final determination, NSK will not be denied adequate relief. Furthermore, contrary to NSK's contention, judicial relief under 28 U.S.C. 1581(c) is adequate. The Court's failure to grant relief at this stage in the proceeding will not preclude NSK from attaining future judicial relief. In certain instances the Court has found jurisdiction under 28 U.S.C. § 1581(i) because "Commerce has decided [an] issue with finality and is continuing to do the very thing which causes the allegedly irreparable injury." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 425, 795 F. Supp. 428, 435 (1992). Here, Commerce has not determined which methodology it will use for its final results. Once Commerce issues its final determination, NSK will have a basis for relief from Commerce's decision and the procedural steps taken to arrive at such a determination. As the Court has already noted, Commerce has not definitively decided to use a different model match methodology than the Family Approach, or if it does, what the new methodology will entail. Rather, Commerce has determined to reassess the methodology that it has employed during previous administrative reviews.

Here, NSK seeks to sidestep the administrative process and obtain judicial review prior to the issuance of a final determination by Commerce. In the review of antidumping duties, "to allow a party to elect to proceed under section 1581(i), without having first availed himself of the remedy provided under section 1581(c), would undermine the integrity of the clear path Congress intended the claimant to follow." *JMC, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000). The Court finds that NSK has failed to demonstrate that jurisdiction under 28 U.S.C. § 1581(c) is manifestly inadequate and that the Court should invoke residual jurisdiction under 28 U.S.C. § 1581(i) to provide judicial relief for an interim decision-making matter. Accordingly, the Court grants Commerce's motion to dismiss this action for lack of subject matter jurisdiction.

CONCLUSION

The Court finds that NSK has failed to meet its burden of demonstrating the need for a temporary restraining order and preliminary injunction. Of the four factors considered for the issuing of injunctive relief, NSK has failed to demonstrate the need for the Court to intervene in Commerce's administrative process. Furthermore, NSK has failed to demonstrate that jurisdiction under 28 U.S.C. § 1581(c) is manifestly inadequate and that the Court has jurisdiction under 28 U.S.C. § 1581(i). The Court will enter judgment accordingly.