print order no. 40104, date set 3/24/2003 time set 10:00

Decisions of the United States Court of International Trade

(Slip Op. 03–26)

WONDERFUL CHEMICAL INDUSTRIAL, LTD., KWONG FAT HONG DYE-CHEMICALS, LTD., BEIJING DYESTUFFS PLANT, CHINA JIANGSU INTERNATIONAL ECONOMIC TECHNICAL COOPERATION CORP., CHINA NATIONAL CHEMICAL CONSTRUCTION JIANGSU CO., CHONGQING CHUANRAN CHEMICALS GENERAL PLANT, CHONGQING DYESTUFF IMPORT & EXPORT UNITED CORP., HEBEI JINZHOU IMPORT & EXPORT CORP., HEBEI WUQIANG CHEMICAL FACTORY, JIAHUI CHEMICAL WORKS, JIANGSU TAIFENG CHEMICAL INDUSTRY CO., SHANGHAI YONGCHEN INTERNATIONAL TRADING CO., LTD., SINOCHEM HEBEI IMPORT & EXPORT CORP., TAIXING TAIFENG DYESTUFF CO., LTD., TIANJIN HONGFA GROUP CO., AND WUHAN TIANJIN CHEMICALS IMPORTS & EXPORTS CORP., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND BUFFALO COLOR CORP., DEFENDANT-INTERVENOR

Court No. 00–07–00369

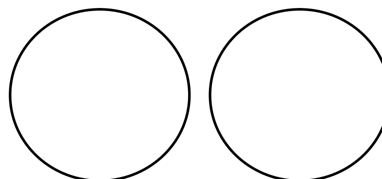
[Department of Commerce's Final Determination is sustained.]

(Dated March 12, 2003)

Aitken Irvin Berlin & Vrooman, LLP (Bruce Aitken) for plaintiffs.
Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Philip J. Curtin,* Attorney, Office of the Chief Counsel, United States Department of Commerce, for defendant.
Collier Shannon Scott, PLLC (Michael R. Kershow and *Paul C. Rosenthal)* for defendant-intervenor.

MEMORANDUM OPINION AND ORDER

GOLDBERG, *Senior Judge:* In this action, the Court reviews a challenge to the Department of Commerce's ("Commerce") final determination to impose an antidumping ("AD") order covering certain producers of synthetic indigo from the People's Republic of China ("PRC"). *See Synthetic Indigo from the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value,* 65 Fed. Reg. 25706 (May 3, 2000) *("Final Determination").*



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Plaintiffs, Wonderful Chemical Industrial, Ltd. ("Wonderful"), Kwong Fat Hong Dye-Chemicals, Ltd. ("Kwong Fat"), Beijing Dyestuffs Plant, China Jiangsu International Economic Technical Cooperation Corporation, China National Chemical Construction Jiangsu Company, Chongqing Chuanran Chemicals General Plant, Chongqing Dyestuff Import & Export United Corporation, Hebei Jinzhou Import & Export Corporation, Hebei Wuqiang Chemical Factory, Jiahui Chemical Works, Jiangsu Taifeng Chemical Industry Co., Shanghai Yongchen International Trading Company, Ltd., Sinochem Hebei Import & Export Corporation, Taixing Taifeng Dyestuff Co., Ltd., Tianjin Hongfa Group Co., and Wuhan Tianjin Chemicals Imports & Exports Corp., Ltd. (collectively "Plaintiffs"), are PRC-based producers of the subject merchandise and seek relief from Commerce's action under USCIT Rule 56.2. Plaintiffs argue that the *Final Determination* was neither in accordance with law nor supported by substantial evidence.

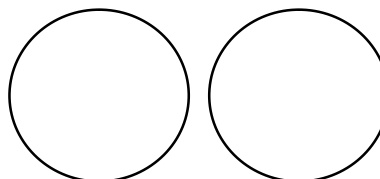
The Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons that follow, the Court sustains Commerce's *Final Determination.*

I. BACKGROUND

On or about June 28, 1999, domestic producers of synthetic indigo, including defendant-intervenor Buffalo Color Corporation ("Buffalo"), and the unions representing their workers filed antidumping duty petitions with Commerce and the International Trade Commission. The petition alleged that the domestic industry was materially injured or threatened with material injury due to imports of certain synthetic indigo sold at less than fair market value from the PRC.

On July 28, 1999, Commerce initiated its antidumping investigation of possible producers/exporters of synthetic indigo. *Notice of Initiation of Antidumping Duty Investigation: Synthetic Indigo from the People's Republic of China,* 64 Fed. Reg. 40831 (July 28, 1999). Due to limited resources, Commerce limited the number of mandatory respondents in the investigation to the two largest producers/exporters of synthetic indigo, Wonderful and Kwong Fat. *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo From the People's Republic of China,* 64 Fed. Reg. 69723, 697925 (Dec. 14, 1999) *("Preliminary Determination").* Wonderful and Kwong Fat are exporters of synthetic indigo based in the PRC and Hong Kong, respectively. The focused investigation was permissible under 19 U.S.C. § 1677f–1(c)(2).[1]

[1] 19 U.S.C. § 1677f–1(c)(2) permits Commerce to limit its investigation to the largest producers if "it is not practicable to make individual weighted average dumping margin determinations. * * * because of the large number of exporters or producers involved in the investigation or review." In such cases "the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to. * * * exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." *Id.*



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Upon further analysis, Commerce shifted its investigation from Kwong Fat to Tianjin Hongfa pursuant to 19 U.S.C. § 1677a(a).[2] Tianjin Hongfa is a PRC-based trading company. Specifically, Commerce examined whether Tianjin Hongfa sold the subject merchandise to Kwong Fat with the knowledge that the merchandise was destined for export to the United States.

On December 14, 1999, Commerce issued a preliminary determination. *Preliminary Determination,* 64 Fed. Reg. at 69297. In its *Preliminary Determination,* Commerce found that Tianjin Hongfa knew or should have known that the merchandise was for export to the United States at the time of sale.

Based on that finding, Commerce, pursuant to 19 U.S.C. § 1677b, calculated the dumping margin to determine if Tianjin Hongfa sold its exports at less than fair market value. *Id.* at 69729. Commerce calculated the dumping margin using surrogate values from Daurala, an Indian-based exporter of phenlyglycine. Phenlyglycine is the primary chemical used in the production of synthetic indigo. Commerce selected Daurala because India is a country that Commerce considers economically comparable to the PRC and because no data was available from a synthetic indigo producer in any other economically comparable country. *Id*. at 69728. Wonderful offered surrogate values from Atul and Traspek, two Indian-based producers of various chemicals including phenylglycine. Commerce claims that it rejected the Atul and Transpek data on the grounds that departmental practice is to use financial data that is more narrowly limited to a producer of comparable merchandise.

Using surrogate values from Daurala, Commerce calculated a dumping margin of 25 percent. Based on that data, Commerce stated in the *Preliminary Determination* that it had reasonable grounds to believe that critical circumstances existed with respect to synthetic indigo from Plaintiffs. *Id.* at 69725.

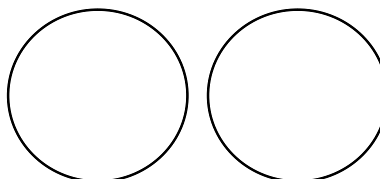
As defined by 19 U.S.C. § 1673b(e), critical circumstances exist if Commerce has reasonable grounds to believe that:

> (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
>
> (A)(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than fair value; and
>
> (B) there have been massive imports of the subject merchandise over a relatively short period of time.

19 U.S.C. § 1673b(e).

Based on its finding of critical circumstances under subsections (A)(ii) and (B), Commerce issued its final determination on May 3, 2000. *Final Determination,* 65 Fed. Reg. at 25706. Subsequently, Buffalo petitioned Commerce for a recalculation of the dumping margins on the grounds

[2] 19 U.S.C. § 1677a(a) provides that "export price is determined by the price at which the subject merchandise is first sold before the date of importation by the producer or exporter of the subject merchandise outside of the United States * * * to an unaffiliated purchaser for exportation to the United States."



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that Commerce failed to consider other profits of Plaintiffs. Upon reconsideration, prompted by Buffalo's petition, Commerce amended the dumping margins to account for profits not included in its original calculation. *See Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Synthetic Indigo From the People's Republic of China,* 65 Fed. Reg. 37961 (June 19, 2000).

Plaintiffs appeal the Final Determination on three grounds. First, Plaintiffs appeal Commerce's decision to treat Tianjin Hongfa as an exporter. Plaintiffs argue that Commerce incorrectly found that Tianjin Hongfa had the requisite knowledge of the final destination of the synthetic indigo it sold to Kwong Fat. Plaintiffs also argue that Tianjin Hongfa was an agent of Kwong Fat, rather than an exporter, based on the definitions provided by 19 U.S.C. § 1677(13). Second, Plaintiffs argue that Commerce's use of surrogate values from Daurala produced aberrational results. Third, Plaintiffs claim that Commerce improperly found the existence of critical circumstances based on the miscalculation of a 25 percent dumping margin.

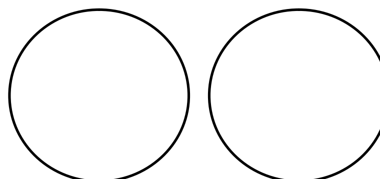
There are two issues on appeal: (1) whether Commerce's determination to treat Tianjin Hongfa as an exporter was proper and (2) whether Commerce's use of surrogate values from Daurala was proper.[3] Commerce's Final Determination with respect to both issues is sustained.

II. Standard of Review

The Court will sustain Commerce's *Final Determination* if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516(b)(1)(B) (1994). To determine whether Commerce's interpretation of a statute is in accordance with law, the Court applies the two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). First, the Court must determine "whether Congress has directly spoken to the precise question at issue." *See id.* at 842. The Court does so by looking to the statute's text to ascertain Congress's purpose and intent. *Timex V.I., Inc. v. United States,* 157 F.3d 879, 881 (Fed. Cir. 1998). If Congress's intent is unascertainable and the statute is either silent or ambiguous on the question at issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843. Thus, the reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *United States v. Mead Corp.,* 533 U.S. 218, 229 (2001).

With respect to factual findings, the Court will uphold the agency's factual findings if they are supported by substantial evidence. *Koyo Seiko Co. v. United States,* 1998 U.S. App. LEXIS 17524 (Fed. Cir. 1998).

[3] Plaintiffs' third argument on appeal challenges Commerce's finding of the existence of critical circumstances. Plaintiffs argue that Commerce's finding of critical circumstances was improper since it was based on the calculation of a dumping margin that exceeded 25 percent. Plaintiffs' sole argument is that Commerce's reliance on surrogate values from Daurala resulted in a miscalculation of the dumping margin at 25 percent. *See* Pl's Reply Br. in Opp. to Def's Briefs at 8. Because the Court has rejected Plaintiffs' challenge to Commerce's use of surrogate values from Daurala, it is unnecessary to address this issue any further.



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Thus, the Court must sustain Commerce's factual determinations as long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions. *See Atlantic Sugar, Ltd. v. United States,* 2 Fed. Cir. (T) 130, 137, 744 F.2d 1556, 1563 (1984).

III. DISCUSSION

A. Commerce's determination to treat Tianjin Hongfa as an exporter

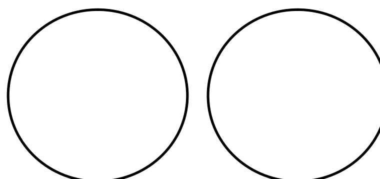
Plaintiffs appeal Commerce's decision to treat Tianjin Hongfa as an exporter. Plaintiffs argue that Tianjin Hongfa does not fall within the meaning of the term "exporter" as used by 19 U.S.C. § 1677(13) and that Tianjin Hongfa lacked knowledge that the United States was the final destination of the exports. Thus, Tianjin Hongfa lacked the requisite knowledge to pass Commerce's "knowledge test," and, therefore, was not an exporter but rather Kwong Fat's "agent" as defined by Section 1677(13).

Since Section 1677(13) was repealed in 1994, it is no longer applicable; the statute remains silent as to what constitutes an individual exporter or producer. *AK Steel Corp. v. United States,* 22 CIT 1070, 1079, 34 F. Supp. 2d 756, 764 (1998). In any event, the parties do not dispute Commerce's application of the knowledge test to determine Tianjin Hongfa's status. Therefore, the Court will not reach the issue of the appropriateness of the application of the knowledge test. *See Princess Cruises, Inc. v. United States,* 201 F.3d 1352, 1355 (Fed. Cir. 2000) (stating that the court need not address issues that are not raised in the briefs on appeal). Thus, the Court assesses the parties' appeal of Commerce's finding of Tianjin Hongfa's status as an exporter in light of their acceptance of the knowledge test.

1. Definition of the Knowledge Test

Commerce has established and applied a "knowledge test" for purposes of determining whether various parties involved in importing and exporting goods are subject to antidumping laws.

A producer passes the knowledge test if the "producer knew or had reason to know at the time of sale that the goods were for export to the United States." Statement of Administrative Action Accompanying The Trade Agreements Act of 1979, H.R. Rep. No. 4537, 388, 411, reprinted in 1979 U.S.C.A.N. 665, 682. Application of the knowledge test has been permitted in various contexts. *See L.G. Semicon Co., Ltd. v. United States,* 23 CIT 1074 (1999) (approving Commerce's application of the knowledge test to determine whether plaintiff-importers were subject to antidumping duties); *see also NSK Ltd. v. Koyo Seiko Co.,* 190 F.3d 1321 (Fed. Cir. 1999) (upholding the use of the knowledge test to determine whether plaintiff was a "reseller" and subject to an antidumping duty); *Shieldalloy Metallurgical Corp. v. United States,* 20 CIT 1362, 947 F. Supp. 525 (1996) (upholding the use of the knowledge test to calculate foreign market value of plaintiff's exports). In determining whether the producer knew or should have known that the subject mer-



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chandise would be exported, this court has held that Commerce need not find that the producer had actual knowledge of the final destination of its exports. *Allegheny Ludlum Corp. v. United States,* 24 CIT ____, ____, 215 F. Supp. 2d 1322, 1331 (2000). This is because, "'under those circumstances, it would be extremely difficult for Commerce to ever conclude that a respondent knew sales were for export[.] * * * The only way to determine actual knowledge is through an admission of the respondent.'" *Id.* at 1332 (quoting *INA Walzlager Schaeffler KG,* 21 CIT 110, 125, 957 F. Supp. 251, 263–64 (1997)). A requirement of the producer's actual knowledge would "eviscerate the acknowledged standard." *Allegheny Ludlum,* 215 F. Supp at 1332. Thus, constructive knowledge has been held sufficient to satisfy the knowledge test. *GSA, S.r.l. v. United States,* 23 CIT 920, 77 F. Supp. 2d 1349, 1355 (1999).

2. Application of the Knowledge Test

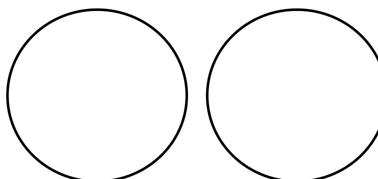
In *GSA,* the court upheld Commerce's determination that a producer knew that the exports at issue were destined for the U.S. when the following factors were present: (1) the producer prepared certificates that stated that the destination of the exports was the United States; (2) the packaging size was used exclusively for the United States; and (3) the producer prepared packages which stated the destination of the exports. *Id.*

Here, Commerce concluded that Tianjin Hongfa passed the knowledge test based on the following factors: (1) Tianjin Hongfa prepared the Certificates of Origin and Fumigation, both of which stated that the exports were bound for the United States,[4] and (2) Tianjin Hongfa reported in its questionnaire that it only sold synthetic indigo to Kwong Fat and knew that Kwong Fat only shipped synthetic indigo to the United States. *See Preliminary Determination,* 64 Fed. Reg. 69723, 69727. Thus, the fact that Kwong Fat took title to the exports before shipment did not detract from Tianjin Hongfa's knowledge of the exports' final place of destination.

In response to Plaintiff's agency argument, Commerce acknowledges that the general manager of Kwong Fat had been hired temporarily by Tianjin Hongfa to act as vice-manager. However, Commerce found "no clear evidence on the record that he is involved in the daily production and operation of Tianjin Hongfa, or that his role is anything other than that of an advisor." *Final Determination,* 65 Fed. Reg. at 25717. Commerce concluded that Tianjin Hongfa was not a mere "agent" of Kwong Fat, as Plaintiffs argue, but rather was an exporter within the meaning of 19 U.S.C. § 1677a(a). *Id.* at 25709.

The Court finds that Commerce acted reasonably in determining that Tianjin Hongfa knew or should have known that its products were bound for the United States. Tianjin Hongfa prepared, signed, and veri-

[4] The Certificate of Origin explicitly stated that the "country of destination [of the exports is] Charlotte, N.C., U.S.A and that the "means of transport and [the] route [were] by steamer [and] from Xingang, China to Charlotte, N.C., U.S.A." Certificate of Origin of the People's Republic of China, 0000033, 08/01/99. The Certificate of Fumigation also stated the exports' destination. Fumigation/Disinfection Certificate, Ministry of Agriculture of P.R. China, 0000031, Dec. 25, 1998.



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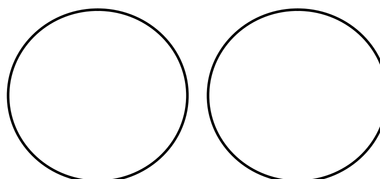
fied two documents, the Certificates of Origin and Fumigation, which explicitly stated that the exports were destined for the United States. Additionally, Tianjin Hongfa verified other shipping arrangement documents, which plainly stated that the destination for the exports was the United States. *Preliminary Determination,* 64 Fed. Reg. at 69727. Finally, Tianjin Hongfa admitted to only selling synthetic indigo to Kwong Fat and admitting to having known that Kwong Fat sold synthetic indigo only to the United States. *Id.*

The Court finds that Commerce's application of the knowledge test and its resultant finding of Tianjin Hongfa's constructive or indirect knowledge is reasonable and supported by substantial evidence on the record. Accordingly, Commerce's determination that Tianjin Hongfa had the requisite knowledge and thus constituted an exporter is upheld. *See Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

B. Surrogate values from Daurala

Plaintiffs claim that Commerce erred in its calculation of the normal value of synthetic indigo by using costs of production and profits from Daurala, an Indian-based producer of phenylglycine. Phenylglycine is the primary chemical used in the production of synthetic indigo. Plaintiffs argue that the financial data from Daurala was inappropriate since Daurala was an inefficient producer and did not produce the same final product as Plaintiffs. Additionally, Plaintiffs claim that data from Atul and Transpek, other Indian-based producers of various chemicals including phenylglycine, provided a better basis for valuing the factors of production and profit. Commerce claims that since it could not find a producer of synthetic indigo, it used Daurala and rejected surrogate data from Atul and Transpek. It did so because Atul and Transpek produced a wider range of products than Plaintiffs and Daurala. Commerce's practice is to use financial data that is more narrowly limited to a producer of comparable merchandise. *Preliminary Determination,* 64 Fed. Reg. at 69723. Commerce rejects data based on a producer of a wider range of products when former data are available. *Id.* According to Commerce, the more narrowly limited data produces more representative results. *Id. See also Taiyuan Heavy Mach. Import & Export Corp. v. United States,* 23 CIT 701, 707 (1999) (approving Commerce's preference for and use of surrogate data that is product-specific).

Commerce is obligated to value the factors of production based on the "best available information" from market economy countries that are at a level of economic development comparable to that of the non-market economy country. Those values must be from a significant producer of "comparable" subject merchandise. *See* 19 U.S.C. § 1677b. Commerce is granted broad latitude and substantial discretion in choosing the information on which it relies. *Shandong Huarong Gen. Corp. v. United States,* 159 F. Supp. 2d 714, 718 (Ct. Int'l. Trade 2001). In *Shandong Huarong,* the court upheld Commerce's use of surrogate values from an Indian-based producer of HTS Category 7214.10.09 forged steel



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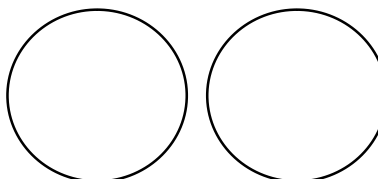
("forged steel"), a product that was deemed comparable to the subject merchandise, steel bars. The court recognized that it was arguable that the forged steel was used in the production of the subject merchandise. *See id.* at 722. Yet the court upheld Commerce's surrogate values because "Congress has granted Commerce substantial discretion and has bound the Court to respect that discretion, even where the Court would have reached a different conclusion had this case been reviewed *de novo*." *Id.* at 723. Thus, the standard of review precludes a court from deciding whether the surrogate values used were the absolute best available in these circumstances. *Id.*

Likewise, based on the substantial discretion afforded Commerce in selecting the data on which it relies and the meaning of "best available information" in 19 U.S.C. § 1677b, Commerce's use of surrogate values from Daurala was reasonable. *See Shandong Huarong,* 159 F. Supp. 2d at 718. In doing so, the Court does not decide whether the surrogate value chosen by Commerce was the absolute best available information. The sole product produced by Daurala, phenylglycine, is considered the primary component used in the production of synthetic indigo. In addition, data from Atul and Transpek covered a wider range of products and therefore may have been less comparable to Plaintiffs' factors of production. Accordingly, Commerce's use of surrogate values from Daurala is upheld.

IV. Conclusion

For the aforementioned reasons, the Court (1) affirms Commerce's determination that Tianjin Hongfa had knowledge of the final destination of its exports and was an exporter; and (2) affirms Commerce's use of surrogate values from Daurala.

So ordered.



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(Slip Op. 03–27)

FORMER EMPLOYEES OF QUALITY FABRICATING, INC., PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 02–00522

[Motion to Dismiss DENIED.]

(Decided March 14, 2003)

Collier Shannon Scott, (John Brew and *Iva Smith)* for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director; *Lucius B. Lau,* Assistant Director, *Victoria L. Strohmeyer,* Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant.

OPINION

WALLACH, *Judge:* Defendant, United States Department of Labor ("DOL"), filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2636(d) (1994), because Plaintiffs brought their suit beyond the sixty-day statutory time period for commencing an action.[1] Plaintiffs, certain former employees of Quality Fabricating, Inc. ("Quality"), contest the decision of the Secretary of Labor denying North American Free Trade Agreement Transitional Adjustment Assistance ("NAFTA TAA") and seek equitable tolling of the statutory time limit. For the reasons discussed below, the Defendant's Motion to Dismiss is denied under the equitable tolling doctrine.

I. BACKGROUND

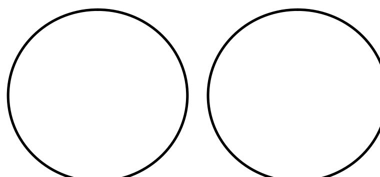
The facts are uncontroverted. On June 28, 2001, Plaintiffs mailed their petition for NAFTA TAA to the DOL. Defendant registered the petition on July 5, 2001, and designated it Petition #5051. Margaret Miller, a former employee of Quality, continuously checked the DOL website starting August 1, 2001.[2]

On October 9, 2001, Ms. Miller e-mailed the DOL regional office in Harrisburg, Pennsylvania, the e-mail address of which was provided on the website, to inquire about the petition. Ms. Miller explained that she was checking the website every day for the determination. She received a return e-mail on October 11, 2001, saying that "these things take time," but she was not advised that she should check or contact any other source. After receiving this e-mail, Ms. Miller contacted two Representatives from Congress, but received no response.

On November 7, 2001, Ms. Miller contacted the State of Pennsylvania Department of Labor Trade Adjustment Representative at the Pennsylvania CareerLink offices. She stated she had been checking the DOL website without result. The state employee assured her that she was do-

[1] Section 2636(d) states that "[a] civil action contesting a final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 * * * is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of such determination."

[2] The homepage for the Department of Labor is found at http://www.doleta.gov.



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ing everything she should and advised her to continue checking the DOL website for the determination. He said the DOL had not yet requested the information from Quality needed to send notifications regarding the determination, and it was therefore unlikely that she would receive notice anytime soon. He also said the DOL would send her a letter when it made the determination.

Ms. Miller then contacted a state legislator and requested help obtaining an answer from her U.S. Senator, and her Representative in the House. On November 21, 2001 she received a letter from the office of her Congresswoman, Melissa Hart, stating that the Quality Fabricating petition was still pending. On December 10, 2001, Ms. Miller again e-mailed the DOL regional office and was told that "these things take time."

On December 18, 2001, Ms. Miller visited the State of Pennsylvania's Department of Labor Trade Adjustment Representative, who checked the web site in her presence and told her that no determination had been made regarding eligibility. He told her again that the DOL had not yet requested the information necessary to send notifications regarding the determination.

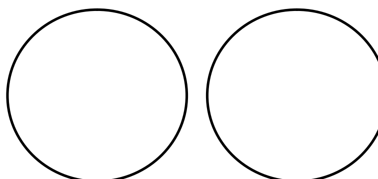
Ms. Miller asked what more she could do to expedite a determination, and the representative gave her two pamphlets addressing benefits under NAFTA TAA.[3] Additionally, he gave her a telephone number for the DOL NAFTA TAA office in Washington D.C., and permitted her to call NAFTA TAA from his office. She left a message. No one returned her call.

From January through May 2002, Ms. Miller e-mailed the general Internet address for the DOL regional office in Harrisburg, Pennsylvania once a month to inquire about the petition. She received no response. On May 9, 2002, the DOL issued a negative eligibility determination for employees of Quality. It was published in the Federal Register *Notice of Determination Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 67 Fed. Reg. 35,140, 35,142 (May 17, 2002) ("Determination").

Ms. Miller first learned of the denial on July 15, 2002, when it appeared on the DOL website, back-dated to May 9, 2002. The notice also contained a hyperlink to a site which discussed appeal rights from a negative determination. That evening, she drafted a letter to the Clerk of Court of the United States Court of International Trade. On July 16, 2002, Ms. Miller, on behalf of Quality employees, sent the letter, via regular mail, requesting an appeal from the DOL's Determination. The Court received Ms. Miller's letter on July 22, 2002, and deemed it filed on that day.[4] Thus, Ms. Miller's letter was filed sixty-six days after the publication of the negative determination in the Federal Register.

[3] The first pamphlet was titled "Transitional Adjustment Assistance Benefits," and the second was titled "Assistance for Workers Under the Trade Act of 1974."

[4] Ms. Miller was unaware of the filing requirements established by USCIT R. 5(e) that "[f]iling is completed when received, except that a paper mailed by certified or registered mail properly addressed to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of mailing."



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II.

STANDARD OF REVIEW

The plaintiff has the burden of pleading and proving the requisite jurisdictional facts to establish this court's jurisdiction by a preponderance of the evidence. *See McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); *Elkem Metals Co. v. United States,* 44 F. Supp. 2d 288, 292 (CIT 1999).

III.

ARGUMENTS

Defendant argues that this court lacks subject matter jurisdiction because Plaintiffs failed to seek judicial review within the sixty-day period prescribed by 19 U.S.C. § 2395(a) (1999)[5] and 28 U.S.C. § 2636(d). The time period required for challenging a determination of ineligibility before this court under 28 U.S.C. § 1581(d)(1) (1994)[6] is governed by 28 U.S.C. § 2636(d). *See Former Employees of ITT v. Sec'y of Labor,* 12 CIT 823, 824 (1988).

Plaintiffs' claim that because government officials misrepresented to Ms. Miller that the DOL website was the official source for the status of plaintiffs' petition and that a letter would be sent to her from the DOL, the court should deem the plaintiffs' action timely commenced under the doctrine of equitable tolling.

IV.

ANALYSIS

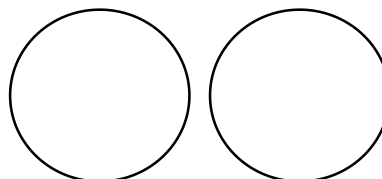
The United States is immune from suit except as it consents to be sued. *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed. 607 (1980); *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 312 U.S. 584 (1941). However, under 28 U.S.C. § 2636(d), private parties are granted the right to contest the DOL's determinations of worker eligibility for NAFTA TAA. The sixty-day period prescribed by 19 U.S.C. § 2395(a), and pursuant to 29 C.F.R. § 90.19(a)(2002),[7] begins to run when the negative determination is published in the Federal Register. In this case, the Determination was published on May 17, 2002, and while Ms. Miller's letter was sent on July 16, 2002, it was not deemed filed until July 22, 2002, sixty-six days after publication in the Federal Register.

The Supreme Court has held that statutes of limitations, in suits against the government, are presumptively subject to equitable tolling. *See Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95–96, 111 S. Ct. 453,

[5] Section 2395 provides that "a worker * * * aggrieved by a final determination of the Secretary of Labor * * * may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination."

[6] Section 1581(d)(1) states that the Court of International Trade has "exclusive jurisdiction of any civil action commenced to review * * * [a] final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 * * * with respect to the eligibility of workers for adjustment assistance under such Act."

[7] Section 90.19(a) states that "any worker * * * aggrieved by a final determination * * * may commence a civil action for review of such determination with the United States Court of International Trade * * * within sixty (60) days after the notice of determination has been published in the Federal Register."



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112 L. Ed. 2d 435 (1990). The doctrine of equitable tolling permits a plaintiff to avoid the bar of a statute of limitations should, despite all due diligence and reasonable efforts, she be unable to obtain information necessary to maintain her claim. *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451 (7th Cir. 1990). However, a mere "[m]istake, misunderstanding, or lack of knowledge is not sufficient grounds for tolling the statute of limitations" on a party's behalf. *Bergstein v. Jordache Enters.,* 1995 U.S. Dist. LEXIS 10718 *9 (S.D.N.Y. Aug. 1, 1995). Indeed, a statute of limitations may not be justifiably tolled if the plaintiff is merely unaware of facts or law. *See Laundry Equip. Sales Corp. v. Borg-Warner Corp.,* 334 F.2d 788, 792 (7th Cir. 1964).

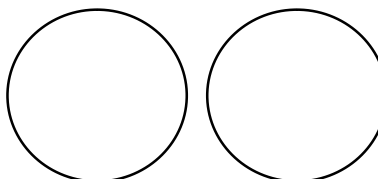
Equitable tolling will apply when plaintiffs remained ignorant of necessary information or requirements through no fault of their own. *Dodds v. Cigna Sec. Inc.,* 12 F.3d 346, 350 (2d Cir. 1993). The Supreme Court in *Irwin* stated that equitable tolling was generally allowed where a complainant was "induced" by his adversary's misconduct into allowing the filing deadline to pass. 498 U.S. at 95–96. However, equitable tolling does not depend on the defendant's wrongful conduct; it focuses on whether there was an "excusable delay by the plaintiff" in bringing a claim. *Santa Maria v. Bell,* 202 F.3d 1170, 1178 (9th Cir. 2000).

This court held in *Former Employees of Siemens Info. Communication Networks, Inc. v. Herman,* 120 F. Supp. 2d 1107, 1113–14 (CIT 2000), that the doctrine of equitable tolling is available in NAFTA TAA cases because "the remedial purpose of the trade adjustment assistance program * * * supports the conclusion that equitable tolling is available" in an action challenging a final determination of the Secretary of Labor regarding worker eligibility for TAA. *Id.* The court in Siemens ultimately held that equitable tolling was not available to the plaintiffs in that case because they failed to act with due diligence in pursuing their claim.[8] *Id.* In determining whether plaintiffs acted with due diligence, the court required "a fact-specific inquiry," and stated that it would be "guided by reference to the hypothetical reasonable person." *Id.*

The Uncontroverted Facts in this Case Demonstrate that Plaintiff Acted as a Reasonably Prudent Person in Relying on the Assertions of Government Officials and Filing Her Claim Challenging Labor's Negative Determination.

The question before this court then, is whether Ms. Miller acted with due diligence. The facts speak for themselves. Ms. Miller continuously

[8] The court cannot entertain requests for judicial review of negative determinations beyond the statute of limitations if plaintiffs fail to either claim equitable considerations or exercise due diligence in bringing their claim. In *Former Employees of ITT v. Sec'y of Labor,* 12 CIT 823 (1988), plaintiffs did not plead equitable tolling and the court held that it lacked jurisdiction because plaintiffs filed their complaint more than five months after publication by the Secretary of Labor. *See also Former Employees of Geosearch, Inc. v. United States,* 11 CIT 953, 954 (1987). In *Kelley v. Sec'y of Labor,* 812 F.2d 1378 (Fed. Cir. 1987), plaintiffs failed to timely file their complaint with the Clerk of Court after receiving actual notice of the negative determination and the Federal Circuit held that the CIT could not take a liberal view of jurisdictional requirements and permit different rules for pro se litigants. *See id.* at 1380; *But see Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89 (explaining that equitable tolling is available against the government where claimant has either actively pursued judicial remedies or is induced to allow filing deadline to pass). *See also Former Employees of Roeder Hydraulics v. Sec'y. of Labor,* 19 CIT 825 (1995) (holding the court lacked subject matter jurisdiction because plaintiffs filed their action sixty days after Labor's final determination, and failed to respond to defendant's motion to dismiss).



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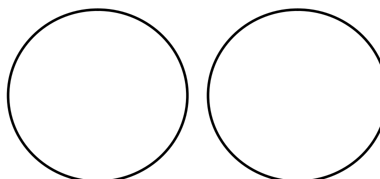
e-mailed the DOL regional office in Harrisburg, Pennsylvania. She was told by a government official that the DOL website would contain the information she needed regarding the petition, and she checked the website daily. She visited the State of Pennsylvania Department of Labor Trade Adjustment Representative. She was told that the DOL would send a letter to Quality requesting the names, addresses, and social security numbers of persons laid off in the previous two years and send notifications regarding the determination. She read the pamphlets given to her by the representative. She called the DOL NAFTA TAA office in Washington D.C. She contacted her federal Representatives. She contacted her state representative. She was affirmatively instructed by government officials to check the DOL website.[9] At no time did the various government officials she spoke with or e-mailed tell her that she was not consulting the correct source of information.[10]

Ms. Miller relied on assurances and instructions from the State of Pennsylvania Department of Labor Trade Adjustment Representative and the DOL egional office that she was checking the correct source for information about the petition. The government officials' affirmative representation, that the correct method by which she should check for notice regarding a determination was the DOL website, caused Ms. Miller to follow her course of action. Ms. Miller's understanding of the process was further confirmed by the Trade Adjustment Representative personally checking the DOL website in her presence in order to determine whether a notice of the determination had been issued. Where a "reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs." *Santa Maria,* 202 F.3d at 1178. The actions of these officials reasonably led Ms. Miller to believe that she was acting appropriately checking the DOL website for a determination while awaiting a letter from the DOL.

Federal courts extend equitable relief sparingly, and the DOL relies on authority that holds tolling is generally only available where a party "has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin,* 498 U.S. at 96 (footnote omitted). During oral argument, Defendant claimed that Ms. Miller was barred from asserting equitable tolling because she was not tricked or induced by the government. While the record demonstrates no intentional trickery by the gov-

[9] The very first day the notice appeared on the DOL website she took action.

[10] Decisions by other courts support the proposition that where a plaintiff is induced by government officials to allow a filing deadline to pass, the court is warranted in granting equitable relief. In *Jarrell v. United States Postal Serv.,* 753 F.2d 1088 (D.C. Cir. 1985), the court excused plaintiff's non-compliance with filing requirements because it resulted from justifiable reliance on the advice of a government officer. *Id.* at 1092. Additionally, in *Early v. Bankers Life & Casulaty Co.,* 959 F.2d 75 (7th Cir. 1992), the court found that an EEOC employee's "erroneous representation" to plaintiff that filling out a questionnaire fulfilled the necessary administrative level requirements and assurance that he had two years from the date of the alleged act of age discrimination to file a claim was sufficient to toll the administrative statute of limitations. *Id.* at 81.



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ernment, it certainly shows inducement. Ms. Miller was told what to do and how to do it. The affirmative instructions she was given were incorrect. If the DOL and its governmental representatives cannot reasonably be expected to know their own rules and procedures, who can? If a working person, untrained in the law and administrative procedures, cannot rely on an affirmative statement by the government of the United States, upon whom can they rely?

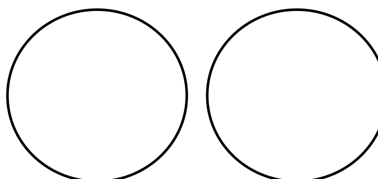
Defendant further claims that merely because Ms. Miller availed herself of the DOL website, a more user-friendly source than the bound Federal Register, such action did not entitle her to rely on the DOL website rather than the Federal Register. Defendant misstates the case. Ms. Miller did not rely on the website; rather, she relied on the assertions made by government officials that she should check the website for the determination.

Defendant also claims that Ms. Miller ignored the instructions in one of the pamphlets the State of Pennsylvania Department of Labor Trade Adjustment Representative gave to her, and that the pamphlet's instructions gave her actual and constructive notice to check the Federal Register. The pamphlet, "Assistance for Workers Under the Trade Act of 1974" mentions the Federal Register in a section titled "Appeal Rights." The language that Defendant cites, on the eighteenth page of the pamphlet, states that "workers whose petition for adjustment assistance has been denied by the U.S. Department of Labor may: * * * [f]ile an appeal seeking judicial review of the U.S. Department of Labor's notice of final negative determination within 60 days of publication of the denial in the Federal Register." Plaintiffs sought the results of their TAA determination and had no reason to further inquire as to their appeal rights until the DOL made a determination. Additionally, Defendant fails to mention that the same pamphlet states on the second page that

> A petition for TAA benefits may have already been filed for workers in your company. You may verify whether a petition has been filed, and the status of the petition, by checking with the local Job Center, Team Pennsylvania CareerLink, UC Service Center, by contacting the Office of the Trade Adjustment Assistance, or by visiting the U.S. Department of Labor's website at http://www.doleta.wdsc.org/trade_act/determinations.asp.

Thus, the pamphlet instructs workers to check the status of their petition through the CareerLink office or to use the internet to go to the DOL website, both of which Ms. Miller did.

As a general rule, publication in the Federal Register is deemed sufficient notice of a determination for the purpose of triggering the sixty day period. *See* 29 C.F.R. § 90.19(a); *Former Employees of Malapai Res.,* 15 CIT 25, 27 (1991). However, equity requires that the court weigh the facts in a tolling case. *See Volk v. Multi-Media, Inc.,* 516 F. Supp. 157, 161–62 (S.D. Oh. 1981). The pamphlet does not state that the Federal Register, rather than the DOL website, is the official source for checking the status of a petition. For the court to permit the Defendant to claim



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that Ms. Miller had constructive knowledge through one pamphlet that instructs a worker to check the DOL website, a course of action consistent with and supported by what she has told by other government officials, would be manifestly unfair.

Finally, the Defendant's oral reply[11] failed to raise persuasive countervailing factors, reasoning, or prejudice that it would suffer should the Court toll the statute in Plaintiffs' favor. A reasonably prudent person should be able to rely on the assurances and instructions of government officials in their field of expertise. When it instructs a party on a course of action the government can hardly claim that a party should know better than to follow its advice. Weighing the government's affirmative instructions against Ms. Miller's actions, the Defendant's arguments against tolling, must fail. Ms. Miller took great care in attempting to preserve her rights and meet the requirements as explained to her by government officials. It would be categorically unreasonable, given Ms. Miller's heroic diligence and persistence, to hold that she should not rely on the assurances and affirmative representations of government officials.

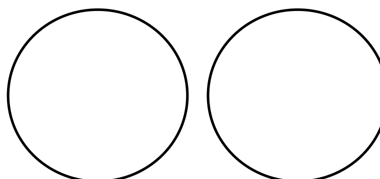
V.

CONCLUSION

The Court of International Trade is a court of equity, 28 U.S.C. §1585 (1999), and it will do equity here. The DOL should blush to have raised this argument against the working people whose interests it supposedly represents. It is this sort of bureaucratic finger-pointing and blame avoidance which caused Ronald Reagan to say, "The nine most terrifying words in the English language are 'I'm from the government and I'm here to help.'"[12] The principles of equity will not permit such conduct. The Defendant's Motion is DENIED.

[11] The court permitted the Defendant to orally reply to Plaintiff's Opposition to Defendant's Motion to Dismiss because Defendant's Reply brief was not filed within time and Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss had not yet reached the court, via mail, by the time set for oral argument.

[12] Speech in Chicago (Aug. 12, 1986).



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(Slip Op. 03–28)

CARPENTER TECHNOLOGY CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

VIRAJ IMPOEXPO LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 00–09–00447

[Antidumping duty remand determination sustained.]

(Decided March 18, 2003)

Collier Shannon Scott, PLLC, (Robin H. Gilbert), Washington, D.C., for the plaintiff Carpenter Technology Corporation.

Miller & Chevalier (Peter Koenig), Washington, D.C., for the plaintiff Viraj Impoexpo Ltd.

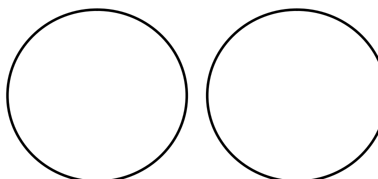
Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen, Director, Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Elizabeth G. Candler),* for defendant The United States; (of counsel: *William G. Isasi,* Attorney, U.S. Department of Commerce).

OPINION

MUSGRAVE, *Judge:* This opinion presumes familiarity with *Carpenter Technology Corp. v. United States*, Slip Op. 02–77 (July 30, 2002). Previously, the Court found that "banding" to account for the absence of complete variable cost of manufacturing ("VCOM") information was not unlawful *per se* for the purpose of matching U.S. and foreign market sales, however the matter was remanded for clarification of the statement that banding had been undertaken "in order to obtain more identical matches." Commerce was also requested to clarify and, as necessary, reconcile Carpenter's allegation that it had applied different standards to Viraj Impoexpo Ltd. ("Viraj") and Panchmahal Steel Ltd. ("Panchmahal"). *See* Slip Op. 02–77 at 17–18.

Remand has resulted in *de minimis* antidumping duties. For U.S. sales that did not have an identical foreign market match due to incomplete VCOM information, Commerce determined that the weighted average of the dumping margin calculated for matched sales is "a reasonable approximation of dumping attributable to Viraj's unmatched sales because it is based on Viraj's own sales data and the Department has found no facts on the record to suggest that such a use would be distortive[and] * * * it is consistent with Department practice." *Remand Results* at 4, referencing *Porcelain-on-steel Cooking Ware from Mexico: Final Results of Antidumping Duty Administrative Review,* 58 Fed. Reg. 43327, 43329 (Aug. 16, 1993). Regarding resort to "banding" to compensate for the incomplete VCOM information, Commerce explains that

> the facts of the record support the conclusion that *banding* is a reasonable alternative to the difference in merchandise analysis. Specifically, Viraj's direct materials costs evidence cost differences between two size ranges. Commerce used *banding* according to



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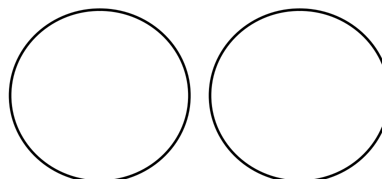
> these two size ranges in the absence of [complete] VCOM data. Therefore, where VCOM data was not available due to confusion over reporting requirements, rather than lack of cooperation, the use of *banding* as non-adverse facts otherwise available for Viraj was reasonable.
>
> In addition, Commerce reviewed the record with respect to the "disparate" treatment between Viraj and Panchmahal. Based on this review, Commerce concluded that such "disparity" is attributable to Panchmahal's failure to cooperate (*i.e.*, Panchmahal's refusal to provide information in the manner in which it was requested by the Department).[] Furthermore, the Department noted that Panchmahal never reported cost data that took size into account for its comparison market, thus precluding the Department from banding its sales or deriving any information to make differences in merchandise adjustments to normal value. Unlike Panchmahal, and as affirmed by this Court, Viraj was a cooperative respondent.
>
> * * * * * * *
>
> * * * [W]hile the deficiencies [in Viraj's and Panchmahal's responses] may relate to similar cost information, the Department determined that the reasons for the deficiencies were different. ([*I*].*e*., Viraj was confused as to the reporting requirements while Panchmahal simply refused to report the requested data. *See Final Results* at 4–7, 11–13.) The Act clearly authorizes the Department to treat respondents differently based on their level of cooperation. *See* 19 U.S.C. 1677e(b). As such, the "disparate" treatment of Viraj and Panchmahal does not violate the statute.

Remand Determination at 3, 4–5 (internal citations omitted; highlighting in original).

The government argues the remand results should be sustained in their entirety. Viraj has provided no comment. Carpenter Technology Corporation ("Carpenter") argues for a different model-matching methodology and for a different margin to assign to unmatched sales as facts otherwise available. Specifically, Carpenter again takes issue with the fact that Commerce reached different results with respect to Panchmahal and Viraj. It argues that on remand the correct interpretation of the remand order was for Commerce to

> address in a substantive manner any difference in the respondents' data submissions that supports use of different methodologies as to the two respondents. To simply state that the different methodologies are appropriate because Panchmahal failed to cooperate in not providing cost information to enable accurate product matching, when Commerce itself recognizes that Viraj also did not provide cost information to enable size-specific product matching, is a distinction without any meaning here. Because the two respondents both failed to provide the requested data to Commerce that would have enabled the agency to make size-specific product matches, Commerce has no reasonable basis for penalizing Panchmahal for this failure and treating Viraj much more favorably.
>
> In its decision to apply an adverse facts available rate to Panchmahal, the Department highlighted the significance of the size vari-



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> able, noting that Panchmahal's "exclusion of the size characteristic in its reported control numbers" was contrary to the instructions expressed in the original questionnaire, and that it was a "necessity" to report costs on a size basis. *Decision Memorandum*, at 6. Yet, despite the similar admission that Viraj's costs were reported "irrespective of size altogether" (and, therefore, unusable), Commerce treated Viraj much more favorably by applying a "banding" methodology and by using non-adverse facts available.
>
> Given this, the only way to correctly respond to the Court's remand instructions was for Commerce to acknowledge that the similar failings of both companies should have similar consequences. As the Court has said, "[i]t was incumbent upon Commerce to apply its rationale to all respondents similarly situated."

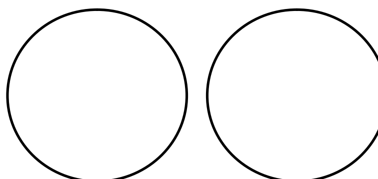
Def.-Int.'s Comments at 3–4. Carpenter complains that Commerce did not follow its policy of calculating costs consistent with model matching criteria developed at the outset of an investigation or review[1] with respect to Viraj although it applied that policy with respect to Panchmahal. Carpenter argues that banding is not a "neutral" use of facts otherwise available because Commerce here "made product comparisons without size-specific data by creating bands of merchandise so broad that a certain amount of sales were thus destined to be 'comparable' to each other[,] * * * a 'gift' to Viraj, while Panchmahal was penalized for a similar deficiency in its data." *Id*. at 4–5.

Commerce has correctly interpreted the order of remand. In its initial briefs, Carpenter challenged Commerce's determination on Viraj's cooperativeness by arguing *inter alia* that deeming Viraj cooperative and Panchmahal uncooperative could not be reconciled. Viraj's cooperation could be sustained on the basis of independent record evidence. Panchmahal is not a party to this proceeding, but the treatment of its circumstances also appeared relevant to Carpenter's allegation of a results-oriented determination. Rather than undertake *arguendo* examination of the respective requests for data and responses from those respondents, the Court considered it appropriate to remand the issue to Commerce for clarification and, as necessary, reconciliation. The remand results adequately explain Commerce's reasoning for its treatment of Viraj as distinct from Panchmahal for purposes of this proceeding.[2]

Carpenter also continues to insist that "[b]anding for either party has the effect of *obviating,* rather than correcting, differences in product characteristics and the attendant matching problems caused by missing cost data." *Id.* at 5. Carpenter alleges that through banding "a *double* benefit was conferred, as the product matches that were so dissimilar that they required constructed value even after the products were rede-

[1] Def.-Int's Comments at 4, referencing *Antidumping Duties; Counterveiling Duties; Proposed Rule,* 61 Fed. Reg. 7308, 7339 (Feb. 27, 1996) ("The Department's practice is to calculate costs consistent with model matching criteria it develops [at the] outset of an investigation or review. The product categories developed in such fashion generally account for significant differences in actual costs affecting price. The Department intends to continue this practice because it prevents any manipulation of the cost analysis through changes in internal product classifications.").

[2] Indeed, Carpenter's argument could also be construed as advocacy for similar treatment of Panchmahal.



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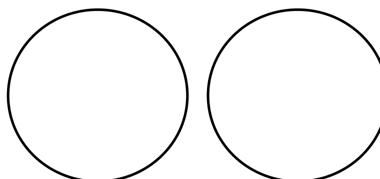
fined by two universal 'bands' produced a margin that was based on already artificially constructed 'identical matches.'" *Id*. (italics in original).

Carpenter's other arguments essentially restate arguments the Court rejected in ruling on the initial motions for judgment on the agency record, *see* Slip Op. 02–77 at 16–17, and these arguments are no more persuasive at this time. As noted in the prior opinion, differences in merchandise must generally exceed 20 percent before merchandise is presumed not comparable. Carpenter's double benefit theory, one of compounding, does not demonstrate, as a matter of fact, that banding produced distorted results, that products within each band are so dissimilar in size from their counterpart as to be incomparable, or that Commerce could not have been other than "satisfied" that a size difmer adjustment was absolutely necessary. Commerce may depart from policy if it provides a reasonable explanation for doing so, *e.g.*, *Industria de Fundicao Tupy v. United States,* 20 CIT 875, 876, 936 F.Supp 1009, 1015 (1996), and it has done so here.

Carpenter lastly complains that it was unclear why the Court observed that the 3.87 percent non-adverse less-than-fair-value margin determined against Grand Foundry in 1994 appeared to be a "tenuous fit" to use for Viraj's unmatched sales. The Court's observation was based upon: (1) the age of that rate; (2) the apparent lack of connection between that respondent and the one at bar; (3) whether there is other evidence in the record that Commerce may reasonably conclude is more probative of Viraj's present circumstances than the older nonadverse LTVF rate (*e.g.*, the zero percent margin determined against Viraj in 1997); and (4) the Court's conclusion with respect to the government's argument in opposition thereto. The Court did not direct Commerce to use a particular rate, only that selected data have to evince a "rational relationship between data chosen and the matter to which they apply." Slip Op. 02–77 at 21 n.12, quoting *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F.Supp. 110, 115 (1992).

CONCLUSION

Commerce's remand results comply with the prior opinion and order and will be sustained.



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(Slip Op. 03–29)

MITCHELL FOOD PRODUCTS, INC., FORMERLY SOUTHERN GOLD CITRUS PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–05–00296

[Upon remand from the Court of Appeals for the Federal Circuit, judgment for the defendant reaffirmed.]

(Dated March 19, 2003)

Donald F. Beach, Esq. for the plaintiff.
Robert M. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, and *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Henry R. Felix)* for the defendant.

MEMORANDUM AND ORDER

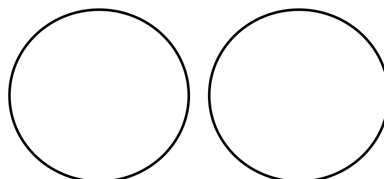
AQUILINO, *Judge:* This court's slip opinion 01–43, 25 CIT ____ (April 12, 2001), familiarity with which is presumed, reported that the trial of plaintiff's complaint herein had left doubt, both as to standing to actually recover and with regard to the merits of the claim for recovery. Whereupon final judgment in favor of the defendant was entered, dismissing this action for return of drawback duties.

The plaintiff appealed to the U.S. Court of Appeals for the Federal Circuit, which determined in an opinion not issued for publication to vacate that judgment and remand the matter to "determine both whether Mitchell Food has standing and whether Mitchell Food is the real party in interest." No. 01–1412, 2002 U.S. App. LEXIS 15475, at *2 (Fed.Cir. July 30, 2002).

I

Comes now plaintiff's counsel, answering this question in the negative. That is,

> [t]hrough inadvertence, counsel had misnamed plaintiff as Mitchell Food Products, Inc. With the summons, a C.I.T. Form 13 was filed as required, indicating Mitchell Food was a wholly owned subsidiary of Packaged Food and Beverage Co. Inc., (PFB) incorporated under the laws of Delaware. PFB in turn was a wholly owned subsidiary of Philip Morris, Inc.
>
> SG [Southern Gold Citrus Products, Inc.] had already ceased operations when its corporate name was changed, and had been kept *in esse* solely to remain viable to proceed against Customs and remain viable to the conclusion of the litigation. The inadvertent misnaming resulted from a misunderstanding with the now retired CEO and Chief Counsel of PFB. Counsel concluded SG's name had been changed to Mitchell *Food,* as opposed to Mitchell *Citrus,* as he was first informed. * * *
>
> As soon as the opinion of the CAFC was issued, counsel made inquiries to Philip Morris Corporation and deduced that Mitchell Citrus Products, Inc. was in fact a Florida Corporation. The original



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> notice to Customs, made part of the complaint, had been correct, i.e. Mitchell *Citrus*.

Memorandum of Law in Support of Plaintiff's [] Remand Motion, pp. 2–3 (underscoring in original). Counsel's affidavit, plaintiff's exhibit A, and the accompanying certification of the Florida Department of State, plaintiff's exhibit C, lend support to this representation. Whereupon plaintiff's motion prays that its summons and complaint be amended to reflect and confirm that Mitchell Citrus Products, Inc., as successor to Southern Gold Citrus Products, Inc., is the real party in interest and has standing to prosecute this action. The motion represents, among other things, that "no omissions of entries on the protests filed by the wronged corporate party"[1] are involved, that the "plaintiff does not wish to assert a different ground for recovery"[2] and that "correction of plaintiff's name in this case will require no new discovery, no new trial, and no inordinate delay."[3]

Given these conditions, and claiming to have reviewed plaintiff's lengthy submission, the defendant has responded that it does not object to plaintiff's proposed amendment to its pleadings. That is,

> we are satisfied with plaintiff's showing that Mitchell Citrus is the legal successor to Southern Gold and is the real party in interest with standing to prosecute this suit.

Defendant's Response to Plaintiff's Motion to Amend its Pleading and Summons, p. 1 (March 17, 2003).

II

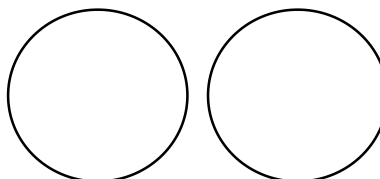
The court concurs in this assessment. Plaintiff's Motion to Amend its Pleading and Summons by Substitution of its Correct Name, Mitchell Citrus Products, Inc., and To Have This Court Find the Latter Named Corporation Is Successor to Southern Gold Citrus Products, Inc. and Is Thereby the Real Party in Interest With Standing to Sue therefore can be, and it hereby is, granted. There being, however, no other relief requested or required under the circumstances, this court's judgment dated April 12, 2001 and entered pursuant to slip opinion 01–43, 25 CIT ____ (April 12, 2001), must be, and it hereby is, reaffirmed.

So ordered.

[1] Memorandum of Law in Support of Plaintiff's [] Remand Motion, p. 23.

[2] *Id.* at 11.

[3] *Id.* at 18.



print order no. 40104, date set 3/24/2003, time set 9:00

NOTICE

CASE MANAGEMENT/ELECTRONIC CASE FILES (CM/ECF) TRAINING

The U.S. Court of International Trade has scheduled training classes in Washington, D.C. on its new Case Management/Electronic Case Files (CM/ECF) System. The classes will review the query-only portion of the Case Management System. The classes will be held on the following dates and times.

Date	**Time**
Wednesday, April 2, 2003	10:00 a.m. – 12:00 p.m.
Wednesday, April 2, 2003	2:00 p.m. – 4:00 p.m.
Thursday, April 3, 2003	10:00 a.m. – 12:00 p.m.
Tuesday, April 8, 2003	10:00 a.m. – 12:00 p.m.
Tuesday, April 8, 2003	2:00 p.m. – 4:00 p.m.
Wednesday, April 9, 2003	10:00 a.m. – 12:00 p.m.

Seats are limited, so if you are interested in attending the training, please send an e-mail to request to attend one of the classes to *cmecf_training@cit.uscourts.gov.* You will receive confirmation of your attendance, along with notification of the location of the training, after you register for one of the classes.

This course has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 1.0 credit hours, which can be applied toward the Law Practice Management requirement.

Dated: March 18, 2003.

LEO M. GORDON,
Clerk of the Court.