Decisions of the United States
Court of International Trade

Slip Op. 04–51

KAIYUAN GROUP CORP., *et al.*, Plaintiffs, v. UNITED STATES, Defendant, and PENCIL SECTION WRITING INSTRUMENT MANUFACTURERS ASS'N, *et al.*, Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 02–00573
PUBLIC VERSION

[Plaintiff Kaiyuan Group Corp.'s Motion for Judgment On the Agency Record is denied; Plaintiffs China First Pencil's Motion for Judgment on the Agency Record Pursuant to Rule 56.2 is granted in part and denied in part; and the United States Department of Commerce's Final Results are remanded]

Dated: May 14, 2004

DeKieffer & Horgan, (*James Kevin Horgan* and *Wakako Takatori*) for Plaintiff Kaiyuan Group Corporation.

Lafave & Sailer LLP, (*Francis J. Sailer*) for Plaintiffs China First Pencil Co., Ltd., *et al.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Ada E. Bosque*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Philip J. Curtin*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

Neville Peterson LLP, (*George W. Thompson*) for Defendant-Intervenors.

OPINION

WALLACH, Judge:

I
Introduction

This matter comes before the court on Plaintiff Kaiyuan Group Corp.'s ("Kaiyuan") Motion for Judgment Upon the Agency Record ("Kaiyuan's Motion"), and Plaintiffs', China First Pencil Co. ("China First"), Guangdong Provincial Stationary & Sporting Goods Import & Export Corp. ("Guangdong"), Orient International Holding Shanghai Foreign Trade Co., Ltd. ("SFTC"), and Three Star Stationary In-

dustry Co., Ltd. ("Three Star"), (collectively, "Plaintiffs China First"), Motion for Judgment on the Agency Record Pursuant to USCIT R. 56.2 ("China First's Motion"). Plaintiffs challenge certain aspects of the United States Department of Commerce's ("Commerce") decision in *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 48,612 (July 25, 2002) ("Final Results"), as amended in *Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 Fed. Reg. 59,049 (Sept. 19, 2002) ("Amended Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1999). For the reasons set forth below, Kaiyuan's Motion is denied; China First's Motion is granted in part and denied in part; and Commerce's Final Results are remanded for action consistent with this opinion.

II
Background

In 1994, Commerce published an antidumping order for certain cased pencils from the People's Republic of China ("PRC"). *Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 66,909 (Dec. 28, 1994) ("Antidumping Order"). On December 20, 2000, Commerce published a notice of opportunity to request an administrative review of certain cased pencils sold during the period of review ("POR"), December 1, 1999, through November 30, 2000, from the PRC.[1] *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Request for Revocation in Part*, 65 Fed. Reg. 79,802 (Dec. 20, 2002). Commerce received requests for administrative review from Kaiyuan, Plaintiffs China First, and the Defendant-Intervenors.[2] On January 31, 2001, Commerce published a notice initiating the review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 66 Fed. Reg. 8,378 (Jan. 31, 2001).

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[1] The scope of the administrative review covered "certain cased pencils of any shape or dimension which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped . . . in any fashion, and either sharpened or unsharpened." *Certain Cased Pencils From the People's Republic of China; Preliminary Results and Rescission in Part of Antidumping Administrative Review*, 67 Fed. Reg. 2,402, 2,403 (Jan. 17, 2002). The cores of a black lead pencils are composed of graphite, clay, wax, and other ingredients. *See* Kaiyuan's Motion at 3. The particular combination of these materials determines the core's hardness. *Id*.

[2] The Defendant-Intervenors are the Writing Instrument Manufacturers Association, Inc., Pencil Section ("WIMA"); Sanford Corp.; Dixon-Ticonderoga Corp.; Aakron Rule, Inc.; General Pencil Co.; Moon Products Inc.; Tennessee Pencil Co.; and Musgrave Pencil Co.

Commerce published its notice of preliminary results and partial rescission of the 1999–2000 review on January 17, 2002. *Certain Cased Pencils From the People's Republic of China; Preliminary Results and Rescission in Part of Antidumping Administrative Review*, 67 Fed. Reg. 2,402. (Jan. 17, 2002) ("Preliminary Results"). In the Preliminary Results, the review was partially rescinded as to Guangdong and Three Star "because they made no shipments of the subject merchandise to the United States during the POR." *Id.* at 2,403. China First, Kaiyuan and SFTC actively participated in the review. *Id.* Guangdong and Three Star stated that they did not export the subject merchandise during the POR. *Id.*

A
Commerce's Investigation and the Parties' Questionnaire Responses

1
China First Pencil and Three Star

On February 12, 2001, Commerce issued antidumping questionnaires. China First indicated in its questionnaire response of April 11, 2001, that it was "a shareholding company listed on the Shanghai Stock exchange . . . owned by its approximately 25,000 shareholders . . . [and that m]ore that 47 percent of [its] shares were held by foreign (non-Chinese) shareholders." China First's Motion at 4. China First stated that one of its shareholders, Shanghai Light Industry Group Co., Ltd. ("SLI"), had administrative responsibility for the protection of Three Star's state-owned assets. China First also stated that while it was under the oversight of SLI, it was neither affiliated with Three Star nor did it coordinate prices, suppliers, customers or business operations with Three Star.

On May 8, 2001, Defendant-Intervenors provided Commerce with information regarding the relationship between Three Star and China First Pencil. Defendant-Intervenors stated that "[the documents included in the Joint Submission demonstrate that China First was provided wide-ranging, substantive oversight of Three Star by SLI, the common owner of both; there is nothing indirect or advisory about China First's role.]"[3] Letter from Defendant-Intervenors to Commerce (May 8, 2001), Defendant's Opposition to

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[3] Previously, during the 1998–1999 review, Defendant-Intervenors had urged Commerce to determine that Three Star was no longer a separate producer, but had become a single entity with China First. Although Commerce did not agree, it stated that it would "revisit this issue if additional evidence regarding [China First's] and Three Star's relationship is presented in a future review." *Issues and Decision Memorandum from The People's Repiblic of China; Final Results and Partial Recission of Antidumping Duty Administrative Review*, 66 Fed. Reg. 37,638 (July 19, 2001), Comment 2.

Plaintiff's Motion for Judgment Upon the Agency Record ("Defendant's Opposition"), Appendix 2 at 8.

On May 18, 2001, Commerce inquired in a supplemental questionnaire about the oversight functions of SLI as a state assets company. In its June 11, 2001, response to the supplemental questions, China First provided a copy of its 2000 annual report including its 1999 and 2000 audited financial statements. This audited report described the state-owned assets company SLI as an "affiliated party" and referred to Three Star, though not by name, as "an affiliate of SLI," but did not indicate that China First had any connection with Three Star. China First's Motion at 5. China First said it had a contractual arrangement with SLI to provide administrative guidance to Three Star relating to sanitation and environmental management issues, production safety measures, and oversight of Three Star's yearbook. China First's Motion at 5. Plaintiffs claimed that SLI "review[ed] the financial statements of its 'subsidiary' companies, owned by 'All the People' to ensure that independent company management is responsibly managing the businesses." *Id.* at 5–6

During January and February of 2002, as part of its antidumping investigation, Commerce conducted verifications of China First and Three Star. After verification of China First's balance sheet and investments ledgers, Commerce stated that "[w]e noted no investment which might indicate unreported [China First Pencil] affiliates, associates or subsidiaries." *Id.* at 7. After the verification of Three Star, Commerce stated that "[w]e noted no investment by Three Star in [China First Pencil]." *Id.* at 8.

In addition to its responses regarding its business structure, China First submitted surrogate value information for several raw materials, including pencil cores, on March 1, 2002. China First included a price list from an Indian producer of black and colored pencil leads. In its Preliminary Results, Commerce determined the values of cores using Indian tariff subheading 9610.20 and relied on the export price quotes, rather than on the Indian Import Statistics, to value cores.

By letter dated April 12, 2002, the Defendant-Intervenors submitted a Chinese document which they said demonstrated that China First and Three Star had merged in 1997, three years before the POR. Defendant-Intervenors also noted the fact that China First and Three Star had offices in the same building in Shanghai. They asserted that the information concerning the two companies' merger should have been provided to Commerce in response to Commerce's questionnaires. The document, entitled "Order No. 1997 005" ("the Order"), was a PRC government agency[4] order requiring the merger of Three Star and China First. It directed China First to absorb

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[4] The order was issued by Shanghai Light Industy (Group) Co., Ltd., "a state-owned corporate entity that functioned like a government agency with administrative responsibility

Three Star's capital and form a group company to include Three Star, and it gave China First the role of managing Three Star and coordinating Three Star's sales and purchases. As a result of its receipt of the Order, Commerce extended the deadline for submission of new factual information pursuant to 19 C.F.R. § 351.302 (2000),[5] reopened the administrative record, and sought comments from interested parties regarding the Order.

On May 24, 2002, Commerce issued a supplemental questionnaire to China First and Three Star that asked questions regarding the alleged merger between the two companies and accepted the Defendant-Intervenors submission. By letter dated June 4, 2002, China First and Three Star filed various documents in response to Commerce's "opportunity allowing China First and Three Star to submit rebutting, clarifying and correcting information concerning the alleged merger between the two companies." China First's Motion at 10. On June 6, 2002, China First and Three Star responded to Commerce's supplemental questionnaire of May 24, 2002. In their responses, the companies stated that they had never merged as claimed by the Defendant-Intervenors.

On June 11, 2002, Defendant-Intervenors submitted to Commerce a series of photographs taken at a Chinese domestic trade fair held in Beijing from May 7–9, 2002, which they said showed China First and Three Star jointly marketing pencils. They also submitted a series of documents that were included in the administrative record of the previous review. Subsequently, on June 13, 2002, China First submitted a rebuttal including documents intended to explain the photographs.

As a result of the Order, Commerce reevaluated the evidence regarding the relationship between Three Star and China First. Commerce found that "the degree of interaction between these two companies [was] far greater than . . . previously believed and the form this interaction takes corresponds very closely to Order 005 as it was

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for the over-sight of state owned assets that was the corporate successor to the former Shanghai Municipal State Assets Management Committee." China First's Motion at 4.

[5] 19 C.F.R. § 351.302 sets forth the procedures for requesting an extension of a time limit:

> (b) Extension of time limits. Unless expressly excluded by statute, [Commerce] may, for good cause, extend any time limit established by this part.
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> (c) Requests for extension of specific time limit. Before the applicable time limit specified under § 351.301 expires, a party may request an extension pursuant to paragraph (b) of this section. The request must be in writing and state the reasons for the request. An extension granted to a party must be approved in writing.
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> (d) Return of untimely filed or unsolicited material. (1) Unless the Secretary extends a time limit under paragraph (b) of this section, the Secretary will not consider or retain in the official record of the proceeding:
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> (i) Untimely filed factual information, written argument, or other material that the Secretary returns to the submitter, except as provided under § 351.104(a)(2).

issued by SLI, indicating that the order may have been effectively implemented." *Issues and Decision Memorandum for the Administrative Review of Certain Cased Pencils from the People's Republic of China; Final Results*, Comment 12 at 36 ("Issues and Decision Memorandum"). In addition, Commerce rejected Plaintiffs' arguments that cores should be valued using private party price quotes and instead continued to use the Indian Import Statistics.

Commerce considers the PRC a nonmarket economy ("NME") country, thus, classifying it as an administering authority which did not operate on market principles of cost or pricing structures, pursuant to 19 U.S.C. § 1677(18) (2000).[6] Commerce selected a surrogate market economy against which to value the PRC's factors of production ("FOPs").

2
Guangdong

During this administrative review, Guangdong responded to Commerce's questionnaires under protest and requested that Commerce terminate its review because it only exported pencils produced by Three Star, and thus, claimed it was excluded by the order during the period of review. *See Initiation of Antidumping Duty Investigations: Certain Cased Pencils From the People's Republic of China and Thailand*, 58 Fed. Reg. 64,548 (Dec. 8, 1993). Guangdong had been excluded previously from the original Antidumping Order because Commerce determined that Guangdong had a zero margin and it exported pencils produced by Three Star. Commerce explained that it excluded "from the application of any order issued imports of subject merchandise that are sold by . . . Guangdong and manufactured by the producers whose factors formed the basis for the zero margin."[7] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg.

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[6] An NME is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18) (2000).

[7] Commerce stated that Guangdong was excluded because under the NME methodology:

> the zero rate for each exporter is based on a comparison of the exporter's U.S. price and FMV based on the factors of production of a specific producer (which may be a different party). The exclusion, therefore, applies only to subject merchandise sold by the exporter and manufactured by that specific producer. Merchandise that is sold by the exporter but manufactured by other producers will be subject to the order, if one is issued. This is consistent with *Jia Farn* [*Jia Farn Manufacturing Co. v. United States*, 17 CIT 187 (1993)] which held that exclusion of merchandise manufactured and sold by respondent did not cover merchandise sold but not manufactured by respondent. Therefore, merchandise that is sold by China First or Guangdong but produced by another producer is subject to suspension of liquidation at the "all others" cash deposit rate.

Final Determination, 59 Fed. Reg. at 55,631.

55,625, 55,631 (Nov. 8, 1994) ("Final Determination"). The Final Determination did not include the identities of the referenced producers, however, the antidumping order issued on December 28, 1994, excluded the exporter/producer combination China First/China First, and Guangdong/Three Star.[8] Response Brief of Defendant-Intervenors Pencil Section, Writing Instrument Manufacturers Association, et al., Pursuant to Rule 56.2 to Brief Filed by China First Pencil Co., Ltd., et al. at 4 ("Defendant-Intervenor's Response to China First").

On July 11, 2001, Guangdong and Three Star responded to Commerce's supplemental questionnaire and provided copies of their financial statements for 2000. Commerce found in its Final Results that the China First/Three Star entity was distinct from the Three Star entity which was excluded from the antidumping order. Issues and Decision Memorandum, Comment 1 at 3. Commerce decided not to exclude the Three Star/Guangdong sales chain from the order and to treat China First and Three Star as a single entity for the purposes of assigning the antidumping duty rate. Ultimately, Commerce assigned to Guangdong the PRC-wide rate with respect to its other sales. At the time of the initiation of the 1999–2000 review, the China-wide rate applicable to any company whose separate rate was not identified because it had never responded to Commerce's questionnaires was 53.65 percent. Commerce calculated a zero antidumping duty rate for Guangdong's exports to the United States of subject merchandise by Three Star and therefore excluded the Guangdong/Three Star export/production channel from the order.

3
Kaiyuan and Laizhou

Commerce issued questionnaires to Kaiyuan and in response, Kaiyuan and its supplier Laizhou City Guangming Pencil-Making Co., Ltd. ("Laizhou"), provided information concerning the latter's Factors of Production ("FOP") in a Section D questionnaire response. Laizhou produced the subject merchandise exported by Kaiyuan, and on April 27, 2001, Laizhou prepared the section D questionnaire

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[8] Petitioners challenged Commerce's Final Determination and Commerce requested and received a remand order from the Court to correct procedural deficiencies in the investigation, and thereafter conducted a remand investigation. The remand proceedings resulted in a determination that China First was selling pencils at less than fair value, but that Guangdong was not. The CIT and the Federal Circuit affirmed the remand determination. *See Writing Instrument Mfrs. Ass'n, Pencil Section v. United States*, 21 CIT 1185 (1997), *aff'd without opinion*, *Writing Instrument Mfrs. Ass'n v. United States*, 178 F.3d 1311 (Fed. Cir. 1998). Commerce issued an amended antidumping duty order that covered pencils made and exported by China First, which excluded the exporter/producer combination Guangdong/Three Star. *Certain Cased Pencils from the People's Republic of China; Notice of Amended Final Determination of Sales at Less than Fair Value and Amended Antidumping Duty Order in Accordance with Final Court Decision*, 64 Fed. Reg. 25,275 (May 11, 1999).

response, which Kaiyuan filed with Commerce. Plaintiff Kaiyuan claimed that in its FOP data Laizhou included an inaccurate translation of the Chinese word "paraffin wax" that was unintentionally translated into "petrol wax."

Defendant-Intervenors suggested that Commerce seek additional information from Kaiyuan concerning Laizhou's FOPs, because they believed that the information provided in the Section D response for a number of factors provided insufficient detail for surrogate valuation purposes. Commerce issued a request to Kaiyuan, and Kaiyuan and Laizhou provided copies of invoices. Subsequently, other parties to the review, but not Kaiyuan, submitted surrogate value data, including Indian and Indonesian import statistics. The data submitted to Commerce included Indian import statistics for HTS subheading 9610.20. In the preliminary results, Commerce determined the surrogate value of petrol wax using Indonesian import statistics for HTS item 2712.90.900, "other petroleum jelly." Commerce determined the value of the cores using Indian tariff subheading 9610.20.

Kaiyuan submitted a letter dated February 8, 2002, which requested that Commerce make corrections on behalf of Kaiyuan and Laizhou. Kaiyuan's Motion at 3. In this letter, Kaiyuan identified the type of wax used in the production of its pencils as "Parafinicmax-Melting point: 53C–56C." *Id*.

B.
Results of the Department of Commerce's Investigation

On July 25, 2003, Commerce published a notice announcing its final results.[9] Final Results, 67 Fed. Reg. at 48,612. In those results, Commerce changed its rescission of the review as to Guangdong and Three Star, found Three Star to be affiliated with China First, held that Three Star and China First were "sufficiently entwined to warrant assigning the combined entry a separate rate," and assigned Three Star the same rate as it found for China First. Guangdong was assigned the China-wide rate of 123 percent, the rate based on calculations for a new respondent.

On July 30, 2002, Kaiyuan asked Commerce to amend its Final Results to correct clerical errors reflected in the calculation of Kaiyuan's dumping margin. Memorandum from Holly A. Kuga, Senior Director, Import Administration, Office IV to Bernard T. Carreau, Deputy Assistant Secretary for Import Administration, Group II, *Antidumping Duty Administrative Review of Certain Cased Pencils from the People's republic of China -Final Results*, Allegation of Ministerial Errors; Kaiyuan's Motion for Judgment on the Agency

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[9] By notice, dated May 8, 2002, Commerce indicated that it was not practicable to complete the review in the time allotted by statute and so extended the final results until July 16, 2002.

Record, Appendix at 9 ("Kaiyuan's Appendix"). Commerce rejected Plaintiff Kaiyuan's request that cores should be valued using private party price quotes and continued to use Indian import statistics. Commerce rescinded the review with respect to Laizhou. Final Results, 67 Fed. Reg. at 48,612. Additionally, on July 31, 2002, Plaintiffs China First filed a submission alleging that Commerce made ministerial errors. Subsequently, on August 5, 2002, the Defendant-Intervenors submitted comments rebutting some of Plaintiffs allegations. Commerce found that the factual information submitted in support of Kaiyuan's request for correction of ministerial errors was untimely. By a notice dated September 11, 2002, Commerce revised its Final Results, and amended the rates applicable to China First and SFTC, and consequently revised the China-wide rate to 114.9 percent. Amended Final Results, 67 Fed. Reg. at 59,049.

III
Arguments

A
Plaintiffs China First

Plaintiffs China First argue that Commerce's finding that Three Star is effectively part of China First is without basis, unsupported by substantial evidence, and contrary to law. Additionally, they claim that Commerce erroneously initiated a review of Guangdong and then erroneously determined that Guangdong was not entitled to a separate rate, but rather the "China-wide" rate of 114.90 percent. This, they argue, effectively applied adverse facts available to Guangdong. Finally, Plaintiffs claim that Commerce erroneously used Indian import statistics to value black and color cores used by China First and SFTC's suppliers.

Defendant and Defendant-Intervenors' claim that Commerce's decision to initiate a review of Guangdong; assign Guangdong the PRC-wide margin rate; determine that China First and Three Star are sufficiently intertwined and should be considered a single entity for purposes of review; and determine the surrogate valuation for pencil cores using Indian import data are supported by substantial evidence and otherwise in accordance with law.

B
Plaintiffs Kaiyuan

Plaintiffs Kaiyuan argue that Commerce's use of a surrogate value for "petrol wax," instead of "paraffin wax," is neither in accordance with law nor supported by substantial evidence in the administrative record. Nor, Plaintiffs Kaiyuan claim, is Commerce's use of surrogate value for black pencil cores in accordance with law and supported by substantial evidence in the administrative record.

Defendant and Defendant-Intervenors claim that Commerce's decision not to correct Plaintiffs Kaiyuan's error, and Commerce's utilization of data from Indian import statistics as the surrogate value for black pencil cores was supported by substantial evidence and otherwise in accordance with law.

IV
Standard of Review

In reviewing Commerce's antidumping determinations, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1999); *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Timken Co. v. United States*, 894 F.2d 385, 388 (Fed. Cir. 1990); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938). "Substantial evidence supporting an agency determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132 (1995) (citing *Universal Camera Corp v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). However, the possibility of drawing two inconsistent conclusions from evidence contained in the record does not render Commerce's conclusion unsupported by substantial evidence. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 81 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

The court determines whether Commerce's interpretation and application of the antidumping statutes are "in accordance with law" by applying the two-step analysis prescribed in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("Chevron"). Under the first step, the Court reviews Commerce's construction of the statute to determine whether Congress has directly spoken to the question at issue. *See id.* at 842. If the statute unambiguously deals with the matter at issue, the court and the agency must give deference to Congress's intent. *Id.* at 842–43. The court determines Congress's intent by employing the "traditional tools of statutory construction," by first examining the statute's text and giving it its plain meaning, because a statute's text is Congress's final expression of its intent. *Id.* at 843 n.9. "If the intent of Congress is clear, that is the end of the matter." *Id.* at 842

If, after employing the first prong of the Chevron two-step analysis, the court determines that the statute is silent or ambiguous as to

the issue, the court must then decide whether Commerce's construction is permissible, rational, reasonable, and supported by the record as a whole. *See id.*, 467 U.S. at 843; *Koyo Seiko Co. v. United States*, 24 CIT 364, 367 (2000). The court examines Commerce's interpretation to determine whether it is reasonable by considering such factors as the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. United States*, 22 CIT 541, 545 (1998).

V
Discussion

Commerce is required to impose antidumping duties on foreign goods that are being or are likely to be sold in the United States at less than fair value. 19 U.S.C. § 1673(1) (2000); *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001). Administrative reviews of antidumping duties are conducted in accordance with 19 U.S.C.§ 1675 (2000). Section 1675(a)(2)(A) requires that Commerce "determine . . . the normal value ["NV"] and export price ["EP"] (or constructed export price ["CEP"]) of each entry of subject merchandise, and . . . the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). The dumping margin is the difference between the NV and the export price EP or CEP of the subject merchandise. 19 U.S.C. § 1677b(a) (2000).

In a "market economy" antidumping case, the NV of a product is the price at which the foreign product is first sold in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i); *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1379 (Fed. Cir. 2001). Antidumping cases involving an NME, however, require that the subject product's NV be determined, if possible, as if a market economy country were involved. *See Baoding Yude Chem. Indus. Co. v. United States*, 170 F. Supp. 2d 1335, 1337 (2001).

The antidumping statute provides that if subject merchandise is exported from an NME, and "the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined," Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1); *Anshan Iron & Steel Co. v. United States*, ___ CIT ___ , SLIP OP. 2003–83 at 8–9, 2003 Ct. Int'l Trade LEXIS 109 (July 16, 2003). Commerce may determine the NV of merchandise exported from an NME by valuing the FOPs based on the "best available information" in "one or more market economy countries that are at a level of economic development comparable to that of the non-market economy country" and that is a significant producer of

merchandise "comparable" to the subject merchandise, pursuant to 19 U.S.C. § 1677b(c)(1)–(2).[10]

Under the statute, Commerce has "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, 201 F. Supp. 2d 1316, 1321 (CIT 2002). In general, Commerce derives the best available information from the answers to the questionnaires issued during the course of the investigation. In making its determination, Commerce must also assess the reliability of the NME company's information and determine whether it does constitute the best available information for purposes of the FOP analysis. *Olympia Indus., Inc. v. United States*, 23 CIT 80, 83 (1999).

Once the investigation is complete, Commerce instructs the United States Bureau of Customs and Border Protection ("Customs") to assess antidumping duties. Commerce conducts its administrative review in antidumping proceedings involving NMEs, such as the PRC, with the rebuttable presumption that all companies within the country are subject to government control.[11] *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). All companies are assessed a single antidumping duty deposit rate unless they demonstrate that they are independent of government control. Commerce's instruction to Customs to apply the "all others" rate in an NME investigation is limited to companies that established their entitlement to a separate rate and expressed a willingness to participate at the investigative stage, but which Commerce did not investigate. This is unlike market economy cases, in which Commerce applies the "all others" rate to companies for which a company-specific rate

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[10] Additionally, 19 C.F.R. § 351.408(c) (2000) provides for the calculation of NV for merchandise from NME countries. It states that:

> For purposes of valuing the factors of production, general expenses, profit, and the cost of containers, coverings, and other expenses . . . under section 773(c)(1) of the Act the following rules will apply:
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> (1) Information used to value factors. [Commerce] normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, [Commerce] normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, [Commerce] normally will value the factor using the price paid to the market economy supplier.

[11] In its Preliminary Results, Commerce stated that "[i]n every case conducted by [Commerce] involving the PRC, the PRC has been treated as an NME." Preliminary Results, 67 Fed. Reg. at 2,405. None of the parties to this proceeding contested Commerce's treatment of the PRC as an NME. *Id.*

is not applicable.[12] *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002).

A
Commerce's Determination that Three Star and China First Should be Collapsed and Considered a Single Entity is not in Accordance With the Law

In its Final Results, Commerce concluded that China First and Three Star were "sufficiently intertwined to warrant assigning the combined entity a separate rate." Issues and Decision Memorandum, Comment 12 at 35. Plaintiffs China First claim that Commerce erroneously found that Three Star was effectively part of China First.

Although not required by the Tariff Act of 1930, Commerce has a practice of assigning multiple entities a single antidumping margin in a market economy case when it determines that the entities are affiliated during an antidumping review. *See Hontex Enters., Inc. v. United States*, 248 F. Supp. 2d 1323, 1338 (CIT 2003); *see also Antidumping Manual*, Chapter 7 at 24. Commerce "collapses" those companies into one and then calculates a single weighted-average margin for those affiliated companies. In order to collapse companies in a market economy investigation, Commerce must first determine that the companies are affiliated. Pursuant to 19 U.S.C. § 1677(33)(F), affiliated or affiliated persons means "two or more persons directly or indirectly controlling, controlled by, or under common control with, any person." After determining affiliation, Commerce then examines whether the producers share "production facilities for similar or identical products." 19 C.F.R. § 351.401(f)(1) (2000). Finally, Commerce determines whether there is "significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(2). Commerce's initial affiliation determination is concerned with the parties potential to impact decisions concerning price or production, while Commerce's collapsing determination is concerned with the potential for manipulation of price or production by the parties.

In making its collapsing determination, Commerce considers factors such as the level of common ownership, the presence of interlocking boards of directors, and the extent to which the companies are intertwined as evidenced by coordination of pricing decisions,

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[12] In 1991, Commerce determined that individual dumping rates were inappropriate in an NME country, and NME exporters would be subject to a single, countrywide antidumping duty rate unless they demonstrated legal, financial and economic independence from their government. *Transcom*, 294 F.3d at 1373; *see Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 2,742, 2,744 (Jan. 24, 1991). This is referred to as the NME Presumption. *Sigma Corp. v, United States*, 20 CIT 852, 858 (1996).

shared employees, or transactions between the companies.[13] *Id.*; *see Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1374 (2000). Collapsing "has been reviewed by this court in the context of market economy producers," and found to be a permissible interpretation of the antidumping statute. *Hontex*, 248 F. Supp. 2d at 1338.

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Commerce's "Sufficiently Intertwined" Methodology in this Case is not a Permissible Interpretation of the Antidumping Statute

Commerce determined that China First and Three Star were a single entity and should receive a single antidumping duty margin. Defendant claims that the market economy regulatory "collapsing" analysis is not directly applicable because China First and Three Star are NME producers. Commerce stated that "antidumping cases involving nonmarket economies are unique because the centralized pricing and production decisions of these countries make internal prices and costs 'inherently suspect.' " Issues and Decisions Memorandum, Comment 12 at 35. It also stated that because the statutes and regulations do not provide explicit guidance on how to analyze relationships between companies located in a nonmarket economy country, it analyzes their relationships on a case-by-case basis. *Id.*

Defendant stated that when "determining whether [China First] and Three Star should be treated as a single entity, Commerce considered whether the companies were 'sufficiently intertwined.' " Defendant's Opposition at 15; *see* Issues and Decisions Memorandum, Comment 12 at 35. Because the collapsing statute is silent in the NME context, Commerce's generally conferred authority permits the agency to address the ambiguity. *See United States v. Mead*, 533 U.S. 218, 229, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001. A reviewing court "is obliged to accept Commerce's position if Congress has not previ-

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[13] The regulation, 19 C.F.R. § 351.401(f), provides that the affiliated producers in antidumping proceedings are treated as a single entity where:

> those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.
>
> (2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
>
> (i) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f).

ously spoken to the point at issue and the agency's interpretation is reasonable." *Mead*, 533 U.S. at 229; *see Chevron* 467 U.S. at 843–44. "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228; *see Chevron*, 467 U.S. at 842–43. To uphold Commerce's NME collapsing methodology, Commerce must have clearly articulated which set of factors formed the basis of its collapsing determination. *See Hontex*, 248 F. Supp. 2d at 1341 (CIT 2003).

Commerce has not articulated a cognizable procedure for collapsing NME companies nor has it followed its former methodology. In determining whether Commerce's collapsing practice is in accordance with law in this case, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[14] *Koenig & Bauer-Albert A.G. v. United States*, 24 CIT 157, 159 (citing *Chevron*, 467 U.S. at 843). Prior to the reduction of Commerce's current collapsing methodology in market economy cases to regulations, the court in *Queen's Flowers de Colom. v. United States*, 21 CIT 968, 979 (1997) reviewed Commerce's market economy collapsing methodology, and stated that because Commerce had "articulated a reasonable set of inquiries for answering the central question, whether parties are sufficiently related to present the possibility of price manipulation . . . the Court finds Commerce's articulation of collapsing factors . . . to be in accordance with law." *Hontex*, 248 F. Supp. 2d at 1342 (citing *Queen's Flowers*, 981 F. Supp. at 628). The court's analysis in *Hontex* further explained that "to the extent that Commerce has followed its market economy collapsing regulations the NME exporter collapsing methodology is necessarily permissible. Where the NME exporter methodology departs from these regulations, however, the court must examine it to determine whether it is a permissible interpretation of the antidumping statute." *Id.* In this case, Commerce has departed from the regulations

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[14] In *Koenig*, the court had originally ordered a remand because Commerce had not substantiated its decision to collapse plaintiff's affiliated companies in determining antidumping duties for respondent's merchandise imported into the United States. The plaintiff had exported a product produced at one location from a subsidiary in another location. The court stated in a footnote that Commerce must decide "whether the affiliated companies are sufficiently intertwined as to permit the possibility of price manipulation." *Koenig*, 24 CIT at 160 n.5. It reviewed Commerce's remand determination and stated that because Commerce had considered factors such as the level of common ownership; whether the companies had interlocking boards of directors; whether the companies had production facilities for similar or identical products; and whether the companies operations were intertwined, as evidenced by coordination in pricing decisions, shared employees or transactions between the companies, its determination was permissible. *Id.*

and interpreted the antidumping statutes.[15] One of its decisions was that 19 U.S.C. § 1677(33)(F)'s definition of affiliated, " two or more persons directly controlling, controlled by, or under common control with, any person" was not instructive in the NME context. Defendant's Opposition at 16. Commerce is free to develop its practice regarding NME collapsing. However, in *Hontex*, Commerce found 19 U.S.C. § 1677(33)(F) instructive.[16] 248 F. Supp. 2d at 1342 (stating that "[h]ere, Commerce identified 19 U.S.C. § 1677(33)(F) as 'instructive' for determining whether two NME exporters are affiliated. . . . [T]o the extent that Commerce investigated by means of questionnaires and otherwise in accordance with established regulations whether the Companies were affiliated, such portion of its [collapsing] methodology is a permissible interpretation of the antidumping statue."). Commerce has not explained adequately why affiliation is not similarly instructive in this instance.

It appears that Commerce examined the information before it and, based on that information, determined which portions of its market economy collapsing regulations were satisfied and deemed the remainder of the regulations inapplicable. Defendant states in its brief that "[t]he intertwining of [China First] and Three Star creates the significant potential for manipulation because [China First/Three Star] can circumvent the order by utilizing the exclusion granted to the Guangdong/Three Star export/production channel." Defendant's Opposition at 25. Defendant-Intervenors provided Commerce with information regarding the relationship between Three Star and China First Pencil. Final Results, 67 Fed. Reg. at 48,612. They submitted a document issued in January 1997 requiring China First and Three Star to merge. The document is entitled the "Order of Shanghai Light Industry Holding (Group), Order # (1997) 005" ("the

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[15] In general, the court is not bound by the agency regulations, but rather is obliged to apply the statutory provisions. *See Writing Instrument Mfrs. Ass'n, Pencil Section v. United States*, 21 C.I.T. 1185, 1193 (1997). Thus, if Commerce chooses to focus on the statutory language to the neglect of its own regulations in making its determination the court will review the statutory interpretation to see if it is in accordance with law. *See id*. Commerce's regulations do not stand on their own, but rather find their basis in the statutory language. *See id*.

[16] In *Hontex*, Commerce considered whether two companies were "connected in such a way that it would frustrate the purpose of the statute to grant [them] separate antidumping duty margins." 248 F. Supp. 2d at 1341. Specifically, it considered whether the record showed any control relationships that may have existed between the two companies as contemplated by 19 U.S.C. § 1677(33). Furthermore, in the *Department of Commerce's Final Results of Determination Pursuant to Court Remand*, for *Hontex*, 248 F. Supp. 2d at 1323, Public Version of Proprietary Doc. A–570–848 at 9, Commerce states that

> in examining whether NME exporters should be collapsed and treated as one entity, the Department applies the factors identified in its regulations concerning collapsing, in addition to examining the export decisions of the exporters being examined. In addressing whether a significant potential for manipulation exists, the Department will consider whether there is common control among the exporters based on the concept of control provided for in section 771(33) of the act.

Order"), and addresses China First and Shanghai Pen & Pencil Company. According to the Defendant-Intervenors, the Order directs China First to absorb Three Star's capital and form a group company that includes Three Star. Additionally, the Order instructs China First to manage Three Star and coordinate its sales and purchases during the capital reorganization. Plaintiffs China First claim that "[a]s China First documented over the course of two separate reviews, through the disclosure of financial statements spanning a five-year period, China First has *never* invested in, purchased, merged with, or even engaged in joint marketing efforts with Three Star." China First's Motion at 20 (emphasis in original).

Commerce appears to have relied significantly on the Order in making its determination to collapse China First and Three Star. Commerce found that the timing and circumstances surrounding certain loans called into question China First's claim that it was Three Star's competitor. Commerce also found that evidence on the record indicated that China First changed its name from China First Pencil Co., Ltd. to China First Pencil Group Co., Ltd. *See* Issues and Decision Memorandum, Comment 12 at 37. Commerce noted that the internet page that Defendant-Intervenors submitted showed that Three Star's address was the same as China First, except for the floor number. Therefore, based on the information submitted by the Defendant-Intervenors, Commerce found that the degree of interaction between the two companies was greater than previously believed, and that the interaction between the company's took a form corresponding very closely to the Order as issued by SLI.

Defendant states in its brief that "the issue here is not whether [China First] and Three Star actually merged. Rather, the issue is whether [China First] and Three Star acted in a manner demonstrating that they are sufficiently intertwined, creating the potential for manipulation." Defendant's Opposition at 24.

Commerce's actions should promote rule of law; supremacy of specifically defined government practice, over arbitrary government action. Absent a definite and articulated set of inquiries, the court is unable to determine whether Commerce's conclusion that the companies did in fact act in a manner that created the potential for manipulation was reasonable. Commerce decided that Three Star was effectively part of China First, and consequently, the potential for manipulation between these two entities was significant.[17] This conclusion has no legal basis. On remand, Commerce must articulate a

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[17] Defendant stated in its brief that

> Commerce was concerned about the potential manipulation because Three Star and [China First] are producers of the subject merchandise. The intertwining of [China First] and Three Star creates the significant potential for manipulation because [China First/ Three Star] can circumvent the order by utilizing the exclusion granted to the Guangdong/Three Star export/ production channel. As Commerce stated:

set of inquiries or methodology through which the court may independently ascertain whether the evidence supports Commerce's findings.

Plaintiffs China First argue that even if Commerce considered China First and Three Star to be affiliated, there was no basis upon which to collapse them. Plaintiffs China First claim that Three Star was a subsidiary of SLI and that SLI was Three Star's sole investor and managing authority. The court will not decide in this case whether this information is sufficient to collapse China First and Three Star because Commerce has failed to articulate an acceptable NME collapsing methodology under which the court might examine the basis for its decision.

B.
Commerce's Determination Regarding Guangdong Is Not Accordance with the Law and Must be Re-Examined

Plaintiffs China First claim that a negative dumping finding requires that any reseller found, on a weighted-average basis, not to be dumping is excluded from the order. An antidumping duty order is issued when an a final determination of an antidumping investigation is affirmative. 19 U.S.C. § 1673d(c)(2) (2000). 19 C.F.R. § 351.204(e)(3) (2000) provides that "[i]n the case of an exporter that is not the producer of subject merchandise, the Secretary normally will limit an exclusion of the exporter to subject merchandise of those producers that supplied the exporter during the period of investigation."[18] In the initial antidumping order, Guangdong, who is a reseller/exporter of pencils, was determined not to be selling pencils at less than fair value, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55,625, 55,631 (Nov. 8, 1994), and was excluded from the order, *Antidumping Duty Order: Certain Cased*

> We note that in finding Three Star and [China First] sufficiently intertwined to warrant assigning the combined entity a separate rate, we are also finding that Three Star's sales through Guangdong are no longer excluded from the order. These determinations reflect the fact that, based on the evidence, Three Star is effectively part of [China First], and at least does not operate as a separate entity. Consequently, the potential for manipulation between these two entities is significant.

Defendant's Opposition at 25 (citing Issues and Decision Memorandum, Comment 12 at 35).

[18] Furthermore, 19 C.F.R. § 351.204(e)(3) provides this example:

> During the period of investigation, Exporter A exports to the United States subject merchandise produced by Producer X. Based on an examination of Exporter A, the Secretary determines that the dumping margins with respect to these exports are *de minimis*, and the Secretary excludes Exporter A. Normally, the exclusion of Exporter A would be limited to subject merchandise produced by Producer X. If Exporter A began to export subject merchandise produced by Producer Y, this merchandise would be subject to the antidumping duty order, if any.

Pencils from the People's Republic of China, 59 Fed. Reg. 66,909 (Dec. 28, 1994) ("Antidumping Order").[19] China First's Motion at 3.

Commerce had originally indicated that the exclusion of Guangdong from the antidumping order was in accordance with 19 C.F.R. § 353.21 (1994) and consistent with *Jia Farn Mfg. Co. v. United States*, 17 CIT 187 (1993).[20] Plaintiffs claim that the concerns raised in *Jia Farn* are not present in this case and Guangdong should have been excluded from the review.

In *Jia Farn*, a producer/exporter was excluded from an antidumping order as a producer/exporter. The plaintiff was alleged to be circumventing the antidumping order by acting as a reseller of products manufactured or produced by other companies whose products were subject to the order. Commerce determined that Jia Farn was transshipping merchandise manufactured by other companies under the order. Commerce argued that it had authority under 19 U.S.C. § 1675 to conduct administrative reviews of Jia Farn as a reseller, exporting the merchandise produced by other manufacturers. *Jia Farn*, 17 CIT at 191. The court explained that "the exclusion of a firm from the order applies only when the firm acts in the same capacity as it was excluded from the order." *Id.* at 192. Likewise, in this case, the regulations permit Commerce to include Guangdong if it begins to export merchandise produced by a supplier subject to the antidumping order. *See* 19 C.F.R. § 351.204 (2000); *Jia Farn*, 17 CIT at 192–93. Thus explained, Commerce has the authority to inquire whether shipment of merchandise to another manufacturer subjected it to the antidumping order. Commerce properly asked that question about Guangdong.

Plaintiffs also argue that, if China First and Three Star are collapsed into one entity, Guangdong should receive the collapsed rate because it cooperated in the review, underwent verification, and only exported pencils from Three-Star. *See* China First Motion at 38. The

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[19] The order's language was based on the final determination's conclusion that it "would exclude from an order imports of subject merchandise that are sold by either China First or Guangdong and manufactured by the producers whose factors formed the basis for the zero margin." Antidumping Order, 59 Fed. Reg. at 66,910; *See* Response Brief of Defendant-Intervenors Pencil Section, Writing Instrument Manufacturers Association, et al., Pursuant to Rule 56.2 to Brief Filed by China First Pencil Co., Ltd. et al. ("Defendant-Intervenor's Response to China First") at 4.

[20] Section 353.21 required that Commerce publish in the Federal Register an "Antidumping Duty Order" that excluded from the application of the order any producer or reseller for which it found that "there was no weighted-average dumping margin during the period for which [Commerce] measured dumping in the investigation." This section was replaced by 19 C.F.R. § 351.204(e) (1997), which states that "[Commerce] will exclude from an affirmative final determination under section . . . 735(a) of the Act or an order under section . . . 736(a) of the Act, any exporter or producer for which [it] determines an individual weighted-average dumping margin . . . of zero or *de minimis*." "In the case of an exporter that is not the producer of the subject merchandise, [Commerce] normally will limit an exclusion of the exporter to subject merchandise of those producers that supplied the exporter during the period of investigation." 19 C.F.R. § 351.204(3).

exclusion given to Guangdong in the antidumping order was narrow, and it participated in this antidumping review and had sufficient notice that if it exported goods from one of the named producers it would be subject to their antidumping rate. *Id.* at 41. After participating in this review, however, Commerce then assigned Guangdong the China-wide rate.

Commerce's practice as to NME exporters is to presume all exporters are under the control of the central government until they demonstrate an absence of government control. This approach has been upheld by the courts. *Air Prods. & Chems. Inc. v. United States*, 22 CIT 433, 436 (1998); *Sigma Corp.*, 117 F.3d at 1405 (Fed. Cir. 1997). "Those exporters who do not respond or fail to prove absence of *de jure/de facto* control are assigned the country-wide rate. Therefore, a NME exporter normally receives one of two rates: either the separate rate for which it qualified or a country-wide rate." *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermkt. Mfrs. v. United States*, 23 CIT 88, 107 (1999) (citing *Transcom Inc. v. United States*, 22 CIT 315, 322 (1998). "This approach obviates the need for an 'all others' rate calculation." *Coalition*, 23 CIT at 107. Defendant states in its brief that "[a]n 'all others' rate was not calculated during the investigative stage of this proceeding. Guangdong cites no precedent, and none exists, for calculating an 'all others' rate during an administrative review of an NME proceeding." Defendant's Opposition at 30. In *Coalition*, which was an NME antidumping investigation, Commerce did assign an "all others" rate, which this court found to be a reasonable.[21] 23 CIT at 107–12. The respondents in *Coalition* who proved an absence of government control received separate company-specific rates during the investigation; respondents who fully participated in the review, but who were not investigated, received averaged non-adverse "all others" rates; and respondents who did not qualify for separate rates or those who did not respond to questionnaires received the China-wide rate based on adverse facts

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[21] Additionally, in *Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey from the People's Republic of China*, 60 Fed. Reg. 14,725, 14,729–30 (Mar. 20, 1995), Commerce confronted a situation where "administrative constraints prevented it from fully investigating NME Respondents who complied fully with questionnaire requests." *Coalition*, 23 CIT at 110. It stated that

> Because it would not be appropriate for the Department to refuse to consider an affirmative documented request for an examination of whether these companies were independent of any non-respondent firms and then assign to the cooperative firms the rate for the noncooperative firms, which in this case is an adverse margin based on best information available, the Department has assigned a special single rate for these firms.

Id. (quoting *Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey from the People's Republic of China*, 60 Fed. Reg. at 14,729–30).

available.[22] *See Id.* at 107. Therefore, precedent does exist for assigning an "all others" rate.

Whether Commerce ultimately determines that Three Star and China First are one entity and should be collapsed does not negate the evidence that Guangdong only exported pencils produced by Three Star. Moreover, Guangdong cooperated in this administrative review.[23] China First's Motion at 38; *see* Preliminary Results, 67 Fed. Reg. at 2,402. Commerce verified that Guangdong only exported pencils from Three Star. *Id.* In its verification report for Guangdong, Commerce stated that "[a]ll of the U.S. sales that we examined were of pencils manufactured by Three Star. We found no evidence that pencils sold to the United States were procured from producers other than Three Star." Memorandum from Case Analysts to The File, No Shipment Verification of Guangdong Stationary & Sporting Goods Import & Export Corp. in the 1999–2000 Administrative Review of Certain Cased Pencils from the People's Republic of China (A–570–827) at 4, China First's Appendix to Brief, Vol. III, Exhibit 9. Commerce did not find that Guangdong either transshipped pencils from China First or sold pencils made by China First. The record evidence solely shows that Guangdong sold pencils made by Three Star. Plaintiffs China First argue that by virtue of Guangdong's participation in the review and its verification that it only exports pencils produced by Three Star, Commerce's application of the China-Wide rate effectively applied adverse facts available to Guangdong.

Commerce has previously assigned the China-wide rate to respondents who did not qualify for separate rates or those who did not respond to questionnaires based on adverse facts available. *See Coalition*, 23 CIT at 107. It has assigned an "all others" rate to cooperative, participating respondents. Commerce normally calculate its antidumping assessment rate by "dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes." 19 C.F.R.

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[22] In *Coalition*, Commerce "investigat[ed] the selected respondents and [after] finding all but two qualified for separate rates, Commerce concluded that an average margin based on the selected Respondents should be assigned to the fully cooperative but uninvestigated Respondents." 23 CIT at 108; *see Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 9,160, 9,173–74 (Feb. 28, 1997). "Commerce reasoned that it would be inappropriate to assign a rate based on adverse facts available that would also apply to PRC exporters who refused to cooperate. *Coalition*, 23 CIT at 108.

[23] In the Preliminary Results Commerce stated that it was

> [P]reliminarily rescinding this review with respect to Three Star and [Guangdong] because they made no shipments of subject merchandise to the United States during the POR. The Department reviewed Customs data which indicates that Three Star and [Guangdong] did not export subject merchandise to the United States during the POR. . . .

67 Fed. Reg. at 2,403.

§ 351.212(b)(1) (2000). And the court has previously found that Commerce's assignment of a rate which is the simple average of dumping margins determined for the exporters individually investigated to be in accordance with the law. *Coalition*, 23 CIT at 111–12.

Certainly, the antidumping statutes give Commerce the discretion to apply an adverse inference when a party fails to comply with its requests for information for determining that rate.[24] *See* 19 U.S.C. § 1677e(b) (2000). However, in order to make this inference, Commerce must first make a determination that facts available is warranted pursuant to 19 U.S.C. § 1677e(a). Following that determination, Commerce may then apply an adverse inference if Commerce makes the additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). In applying adverse facts available, Commerce must articulate the reasons for its determination that a party failed to act to the best of its ability. *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 838 (1999). If Commere applies an adverse facts available rate, it must "balance the statutory objective of finding an accurate dumping margin and inducing compliance, rather than creating an overly punitive result." *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004); *see F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032–33 (Fed. Cir. 2000). Moreover, the court in *Usinor Sacilor v. United States*, rejected an adverse facts available rate for a respondent who has substantially complied with Commerce's requests. 19 CIT 1314, 1316 (1995) ("assessing the circumstances present — i.e., Usinor's near total compliance with Commerce's limited reporting arrangement as well as the presence of particular data flaws that were outside of Usinor's control — the court finds that Commerce's inclusion of the highest non-aberrant margin in the weighted average calculated margin is improper."); *see Coalition*, 23 CIT at 115.

Guangdong participated in the review and the verification, therefore, Commerce's application of the China-wide rate is not in accordance with the law and effectively applies a punitive result to a cooperative respondent.[25] *See Id.* at 107–12. Additionally, Commerce's

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[24] Commerce may employ adverse inferences to a party who has not cooperated in supplying missing information "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–826 at 870 (1994).

[25] In *Shandong Huarong Gen. Group Corp. v. United States*, Slip-Op. 2003–135 at 61–62, 2003 Ct. Intl. Trade LEXIS 153 (Oct. 22, 2003), the court found that Commerce's determination to reject the Companies' separate rates evidence and, thus, assign them the PRC-wide antidumping duty margin based on the presumption of state control due to verification failures, the inadequacy of cooperation and the lack of integrity of reported data "cannot be the basis for assigning the Companies the PRC-wide antidumping duty margin based on facts available, as it is clear the Companies did provide evidence of their entitlement to separate

NME collapsing methodology regarding Three Star and China First was not in accordance with the law. Therefore, on remand, Commerce's decision regarding Guangdong as well as its application of the China-wide rate to Guangdong must be re-examined.

C
Commerce's Utilization of Data from Indian Import Statistics as the Surrogate Values for "Petrol Wax," instead of "Paraffin Wax," and Decision not to Correct Plaintiffs Kaiyuan's Translation Error Was in Accordance with Law and Supported by Substantial Evidence in the Administrative Record

Commerce is required to value a company's FOPs based on the "best available information," in one or more market economy countries, which are at a level of economic development comparable to that of the NME country, and "that [are] a significant producer of 'comparable' subject merchandise." *Shandong Huarhong Gen. Corp. v. United States*, 159 F. Supp. 2d 714, 719 (2001); *see* 19 U.S.C. § 1677b(c)(4) (1999). Plaintiffs reported FOPs included numerous types of wax: paraffin wax, emulsified wax, bees wax, wax, clear wax, mixed wax, and petrol wax. Memorandum from The Team to The File, Preliminary Results of the Administrative Review of Certain Cased Pencils from the People's republic of China (PRC), Selection of Surrogate Values for Factors of Production at 5–6, Kaiyuan's Appendix 12. Commerce must calculate antidumping duty margins as accurately as possible. *See Rubberflex SDN. BHD. v. United States*, 23 CIT 461, 469 (1999). However, in order to calculate the correct margin, an interested party must provide Commerce with "accurate, credible, and verifiable information." *Gourmet Equip. Corp. v. United States*, 24 CIT 572, 574 (2000). Furthermore, it is the respondent's responsibility to provide that information. *Chinsung Indus. Co. v. United States*, 13 CIT 103, 106 (1989).

Commerce is afforded discretion in determining what constitutes the "best available information," *see Timken*, 201 F. Supp. 2d at 1325, and Commerce derives this information from a party's questionnaire responses. Commerce must determine that the information that it bases its surrogate values on is the best available; whether the information relates to the respondent's production or related to prices and values in the surrogate country. *Timken*, 201 F. Supp. 2d at 1325–26. Information that is provided in questionnaire responses

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rates and there is no indication that any necessary information was missing or incomplete. *See* [*Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)]." The court did not uphold Commerce's determination in part because the parties in the case provided evidence of their independence from government control which Commerce verified, and thus, the court did not sustain Commerce's determination that the Companies should be assigned the PRC-wide antidumping duty margin based on facts available. *Id.* at 62–64.

or publicly available information used to value factors in nonmarket economy cases, allegations concerning market viability, and upstream subsidy allegations, are considered factual information. *World Finer Foods, Inc. v. United States*, 24 CIT 541, 549 (2000); 19 C.F.R. § 351.301(a) (1999).

Commerce, with its limited resources, cannot guarantee that the parties' submissions are correct. *Murata Mfg. Co. v. United States*, 17 CIT 259, 265 (1993). However, in cases where Commerce makes an error, Congress intended that Commerce establish procedures for the correction of "ministerial errors" propagated by Commerce that occur after the final results of a review are published.[26] 19 U.S.C. § 1673d(e) (2000). Ministerial errors are errors in addition, subtraction, or other arithmetic function; clerical errors that result from inaccurate copying, duplication, or the like; and any other similar types of unintentional or inadvertent errors.[27] *World Finer Foods*, 24 CIT at 549–50; 19 C.F.R. § 351.224(f) (1999). It is these types of ministerial errors that Commerce must correct, especially if the error is so obvious and egregious that the failure to correct it would be "an abuse of discretion" and "undermine the interests of justice."[28] *Tehnoimportexport v. United States*, 15 CIT 250, 258–59 (1991) (explaining that where a plaintiff's mistake was obvious, the government's failure to correct it was an abuse of discretion).

The procedures that Commerce promulgated to correct these errors are found in 19 C.F.R. § 351.224(c)(1) (2000), which provides that comments from

> A party to the proceeding to whom [Commerce] has disclosed calculations performed in connection with a preliminary determination may submit comments concerning a significant ministerial error in such calculations. A party to the proceeding to whom [Commerce] has disclosed calculations performed in connection with a *final determination* or *the final results of a review* may submit comments concerning any ministerial error in such calculations. Comments concerning ministerial errors

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[26] Pursuant to 19 U.S.C. § 1673d(e), Commerce "shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors."

[27] From the context of the statute and the regulations themselves, it is clear that "Congress intended to cover only an error committed by Commerce itself." *Alloy Piping Prods. Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1290 (Fed. Cir. 2003).

[28] In *Serampore Indus. Pvt., v. United States*, the court stated that it was "loathe to affirm a determination that might be based on a questionable record." 12 CIT 825, 834 (1988). Furthermore, in *Koyo Seiko Co., Ltd. v. United States*, the court held that Commerce erroneously refused plaintiffs' request that it correct clerical and transcription errors in data it submitted to Commerce which was used in the final determination. 14 CIT 680, 683 (1990). The limited burden imposed by virtue of a remand ordering the correction of input errors was outweighed by the preference for accuracy. *Id.*

> made in the preliminary results of a review should be included in a party's case brief.

Id. (emphasis added). The regulations further provide that Commerce "will analyze any comments received and, if appropriate . . . correct any significant ministerial error by amending the *final determination*." 19 C.F.R. § 351.224(e) (emphasis added). On September 21, 2001, Plaintiffs China First submitted a letter to Commerce containing comments and information regarding "Commerce's selection of surrogate countries and the information to be used by [Commerce] in valuing the factors of production." Kaiyuan's Appendix 11. The letter stated that "[t]he principal materials used in Respondents production of pencils include the following materials: tallow, graphite powder, kaolin (china) clay, white glue, paraffin wax, pencil slats, plastic foil/film, lacquer, erasers, and aluminum ferrules," and provided the value for "paraffin wax. *Id*. Plaintiffs Kaiyuan view their submission's inclusion of petrol wax as a facial error, and that Commerce should have realized a mistake had been made in Kaiyuan's submissions.

In a letter dated October 4, 2001, Commerce informed Kaiyuan that it did not possess publicly available information to value petrol wax. Defendant's Opposition at 7. Kaiyuan argues that because there were no values or technical specifications placed on the record for petrol wax, that this leads to the conclusion that it is an industry norm to use paraffin wax in the manufacturing and pencil making process and that in this particular industry wax has only one meaning. Kaiyuan's Motion at 8–9. The parties, however, provided no evidence or citation to an industry norm.[29] If a respondent's error is apparent from the face of Commerce's final decision or from the underlying calculations, Commerce is required to make corrections, *see Koyo*, 14 CIT at 683, and should it fail to correct that error its lack of action is arbitrary and capricious. *See Alloy Piping Prods., Inc. v. United States*, 334 F.3d 1284, 1292 (Fed. Cir. 2003). Moreover, if Commerce fails to correct an error that is or should have been apparent from the face of the final determination, the error in effect becomes a government error, and thus, a "ministerial error," which Commerce is statutorily required to correct. *Id*. at 1293.

Commerce, to the extent possible, relies on publicly available information from the relevant surrogate country to value a company's FOPs. *See Antidumping Manual*, Chapter 8 at 70–71. On December 31, 2001, Commerce published a letter outlining its decision to value

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[29] The *Kirk-Othmer Concise Encyclopedia of Chemical Technology* 1260 (3d ed 1985), under mineral waxes, describes a paraffin wax as a "petroleum wax consisting principally of normal alkanes." The encyclopedia then states that petroleum wax is "outstanding as a cost-effective moisture and gas barrier . . . [m]uch of the petroleum wax produced is food-grade quality, although such quality may well be used in non-food-grade applications to simplify inventorying." *Id*.

petrol wax using Indonesian import data from the Foreign Trade Statistical Bulletin of Indonesia ("FTSBI"). Kaiyuan's Appendix 12. Commerce stated that:

> [i]n determining the appropriate surrogate value for each factor of production, we selected, where appropriate and to the extent possible, from publically available information which was: (1) an average, non-export value; (2) representative of a range of prices within the POR, or closest in time to the POR; (3) product-specific; and (4) tax-exclusive. Whenever possible, we selected surrogate values that were from the primary country in accordance with Commerce's preference to select data from a single country

Id.

In response, Kaiyuan submitted a letter dated February 8, 2002, which requested that Commerce make corrections on behalf of Kaiyuan and Laizhou. Kaiyuan's Motion at 3, Appendix 6. In this letter, Kaiyuan identified the type of wax used in the production of its pencils as "Parafinicmax- Melting point: 53C–56C." *Id*. Kaiyuan's FOP submissions included numerous types of wax: paraffin wax, emulsified wax, bees wax, wax, clear wax, mixed wax, and petrol wax. Kaiyuan's Appendix 12. However, in its letter of February 8, 2002, Kaiyuan did not indicate what item Parafinicmax was in addition to or what item it was to replace in its submission.

On July 30, 2002, Kaiyuan submitted a clerical-error allegation to Commerce. Kaiyuan's Appendix 8. In this letter, Kaiyuan argued that Commerce improperly used a surrogate value for petrol wax when it claimed that the record demonstrated that Kaiyuan used paraffin wax. Commerce disagreed and its memorandum stated that "throughout this segment of the proceeding, Kaiyuan unequivocally and consistently identified the type of wax used in pencil production as petrol wax." Kaiyuan's Appendix 9. The court affords Commerce substantial discretion in determining what types of unintentional or inadvertent errors qualify errors are "ministerial." *Shandong*, 159 F. Supp. 2d at 728; *Cemex, S.A. v. United States*, 19 C.I.T. 587, 593 (1995).

In this case, Commerce properly refused to correct Kaiyuan's translation error. Kaiyuan did not provide clear evidence so that Commerce might determine that it was using the incorrect product in making its determination. Information that is provided in questionnaire responses or publicly available information used to value factors in nonmarket economy ("NME") cases, allegations concerning market viability, and upstream subsidy allegations, is considered factual. 19 C.F.R. § 351.301(a). Commerce use of Plaintiff's erroneous translation in making its determination does not convert Plaintiff's mistake into a "ministerial" error. Furthermore, because the mistakes in this case were made by the Plaintiff, they are not the

type of "ministerial" errors Congress intended Commerce to correct. Kaiyuan's error was not so obvious or patent that it would result in injustice, nor did Commerce ignore relevant record evidence.

D.
Commerce's Use of Surrogate Values in Calculating the Dumping Margin is in Accordance with Law and Supported by Substantial Evidence in the Administrative Record

Plaintiffs China First argue that the choice of India as the principal surrogate country in an NME analogy lead to the use of data they claim is unreliable. They argue that while there is Indonesian surrogate data on the record for only 25 of the 69 FOPs, the Indonesian data is nonetheless of better quality because the Indian surrogate data available for virtually every significant factor of production are allegedly aberrational, unreliable, and non-specific.

Commerce values FOPs using the costs of the FOP in a market economy that was at a level of economic development comparable to the PRC, and a significant producer of comparable merchandise during the POR. Commerce found India to be the appropriate surrogate country at a level of economic development comparable to the PRC, because India was comparable to the PRC in terms of per capita gross national product and the national distribution of labor. *See* Issues and Decision Memorandum, Comment 7 at 19; Memorandum from The Team, Through Howard Smith, Program Manager, Group II, Office 4, To The File, Factors of Production (FOP) Valuation (July 16, 2002) ("FOP Memorandum"); China First's Appendix to Brief, Vol. I Exhibit 20. Moreover, it determined that India was a significant producer of comparable merchandise. Issues and Decision Memorandum, Comment 7 at 19.

Commerce determined that Indonesia was comparable to the PRC in terms of its per capita gross national product and national labor distribution, as well as being a significant producer of comparable merchandise. Commerce relied on Indonesian values and U.S. values in instances where Indian surrogate value information was not available. For purposes of calculating NV, Commerce attempted to value the FOPs using surrogate values that were in effect during the POR. Commerce valued FOPs regarding graphite, kaolin clay, bees wax, mixed wax, wax, clear wax, lacquer, paint, dipping lacquer, glue, clear glue, foil, sealing paper, stearic acid, printing ink, key chain, plastic, foam grip, glitter, talcum powder, heat transfer film, pigment, dye, dyestuff, diluent, hardening oil, and cellulose based on Indian import data from the Monthly Statistics of the Foreign Trade of India ("MSFTI") for April–August 2000. Preliminary Results, 67 Fed. Reg. at 2,406. Commerce valued black cores, color cores, raw pencils, erasers, and ferrules based on Indian import data from the MSFTI for January–December 2000. *Id*. It also valued "petrol wax", tallow, paraffin wax, and emulsified paraffin wax based on Indone-

sian import data from the Foreign Trade Statistical Bulletin of Indonesia ("FTSBI") for January–December, 2000. Kaiyuan's Appendix 12.

Plaintiffs Kaiyuan claim that the import statistics were comprised of data relating to both black and colored cores without differentiating between the two. They claim that this resulted in the calculation of a single average unit value used as the surrogate value for Plaintiffs' black core usage and color core usage and that this single average value was premised upon a small total annual volume of imports into India of both types of cores. They further claim that the value from the import statistics was aberrational and that Commerce refused to use what they call "legitimate values" from two other independent and corroborating sources that provided separate black and color core values that demonstrated the aberrational nature of the Indian Import statistics-based value.[30]

The "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620. Substantial evidence requires that the agency's determination be based on the whole record and the reviewing court must examine all evidence that fairly supports and detracts from the determination. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Commerce considers small-quantity import information or data unreliable when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries. *Shakeproof*, 24 CIT at 490–91.

Commerce claimed that although the volume of cores imported into Indonesia during 2000 was substantially greater than that imported into India during the POR, it did not find Indian imports of over 3,400 kgs. of pencil leads from seven different market economy countries to be insignificant. Commerce derived weighted average Indian and Indonesian import values of 7.69 USD/kg. and 6.47 USD/kg. Commerce noted that the weighted-average Indian import price did not substantially vary from the weighted-average Indonesian import price. Commerce decided not to consider the Indian price quotes that the Plaintiffs submitted because they were undated, were export prices, and it was not clear that any sales were made pursuant to these quotes. It did not consider the Indonesian price quotes placed on the record because the quotes were for sales to the United States, rather than for sales within a potential surrogate country, and were dated outside the POR. The Indian and Indonesian import statistics each only include a category for black and colored cores together without providing any more details regarding the types of

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[30] The cores data consisted of an undated price quote from an Indian exporter and a price quote dated January 10, 2002, from an Indonesian company for export of cores to the United States.

cores being imported. Moreover, the price quotes for cores were placed on the record by a party affiliated with a U.S. importer of subject merchandise. Therefore, Commerce valued black and color cores based on Indian import statistics, which it concluded was the best available information on the record. Issues and Decision Memorandum, Comment 4 at 12–13; Defendant's Opposition at 10. This decision is supported by substantial evidence and in accordance with the law.

VI.
Conclusion

For the foregoing reasons, Commerce's decision in the Final Results, 67 Fed. Reg. 48,612 (July 25, 2002), as amended in the Amended Final Results, 67 Fed. Reg. 59,049 (Sept. 19, 2002) is remanded to Commerce for proceedings consistent with this opinion. On remand, Commerce must articulate specifically the portions of the existing collapsing statutes and regulations which are applicable or inapplicable in the NME context. It must then provide the court with a clearly articulated methodology for collapsing companies in NME countries.

Commerce must reevaluate Guangdong's rate in light of the court's decision that its collapsing methodology was not in accordance with the law. It must also reevaluate the application of the China-wide rate to Guangdong because Commerce effectively applied adverse facts to a participating and cooperative respondent.

Commerce's refusal to correct Kaiyuan's translation error is supported by substantial evidence and in accordance with the law as is its decision to use values from black and color cores based on Indian import statistics.

Slip Op. 04–58

MOTION SYSTEMS CORPORATION, Plaintiff, v. **GEORGE W. BUSH**, President of the United States, and **ROBERT B. ZOELLICK**, United States Trade Representative, Defendants, and **CCL INDUSTRIAL MOTOR LTD.**, Defendant-Intervenor.

Court No. 03–00146

[Summary judgment granted for defendants]

Decided: June 3, 2004

Fitch, King & Caffentzis (*Richard Carville King, James Caffentzis*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Steven C. Tosini*, Trial Attorney, Commercial Litigation

Branch, Civil Division, United States Department of Justice; *David L. Weller,* Assistant General Counsel, Office of the United States Trade Representative, of counsel, for defendants.

Kaye Scholer LLP (*Michael P. House and Margaret S. Rudin*) for defendant-intervenor.

OPINION

STANCEU, Judge:

Plaintiff Motion Systems Corporation challenges a decision by the President of the United States to deny import relief to the U.S. industry manufacturing "pedestal actuators," which are components of electrically-powered vehicles used by persons whose mobility is impaired. Plaintiff's principal argument is that the President exceeded his statutory authority in declining to impose import quotas on pedestal actuators from the People's Republic of China ("China") following a recommendation by the United States International Trade Commission that import quotas are needed to remedy "market disruption" adversely affecting the U.S. pedestal actuator industry. Plaintiff contends in particular that the President acted contrary to the relevant statute in denying relief without quantifying the adverse impact of providing relief and demonstrating that this adverse impact was "clearly greater" than the benefits that such relief would provide to the domestic industry.

Motion Systems has named as defendants the President and the United States Trade Representative, who issued a recommendation to the President addressing the issue of import relief after publishing a notice soliciting comment and conducting a public hearing. In addition to its primary argument, plaintiff raises objections to the U.S. Trade Representative's conduct of the public hearing, to the President's considering certain political factors that Motion Systems considers improper, and to the apparent denial of Motion Systems' request to the U.S. Trade Representative that the President reconsider the final decision.

This matter is before the court on two motions by defendants. Defendants moved to dismiss for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1) and, previous to that motion, sought dismissal of this action through judgment upon an agency record pursuant to USCIT Rule 56.1.

This court concludes that it has subject matter jurisdiction of this case under 28 U.S.C. § 1581(i). This court further concludes that the President's decision declining to impose restraints on imports of pedestal actuators must be upheld because it is within the authority delegated to the President by the relevant statute. The court finds no basis to conclude that the presidential decision misconstrued statutory provisions or must be overturned for noncompliance with procedural requirements. Additionally, the court finds no basis to order a reopening of proceedings for reconsideration of the final presidential

decision. Accordingly, for the reasons discussed below, defendants are entitled to judgment as a matter of law.

I. BACKGROUND

The pedestal actuators imported from China, and the pedestal actuators manufactured in the United States by Motion Systems Corporation, are motor-driven mechanical devices chiefly used as components in mobility scooters and electric wheelchairs. As typically installed in a mobility scooter or electric wheelchair, a pedestal actuator converts rotary motion, created by the electric motor, to the linear motion required to raise and lower the seat.

Motion Systems Corporation sought import relief through the administrative proceedings summarized below. Electric Mobility Corporation, a manufacturer of mobility scooters and purchaser of Chinese-origin pedestal actuators, opposed the imposition of import relief in those administrative proceedings, as did defendant-intervenor CCL Industrial Motor Ltd., a Chinese manufacturer of pedestal actuators.

A. Procedures Leading to the President's Decision to Deny Relief

Motion Systems, on August 19, 2002, petitioned the U.S. International Trade Commission (the "USITC") for relief from imports of pedestal actuators from China, under procedures established by section 421 of the Trade Act of 1974, as amended (19 U.S.C. § 2451) ("Section 421"). Section 421, added to the Trade Act of 1974 by the U.S.-China Relations Act of 2000, establishes procedures under which the President, following an affirmative "market disruption" determination by the USITC, is empowered to proclaim "increased duties or other import restrictions" on a product of China that "is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product." 19 U.S.C. § 2451(a). "Market disruption" is found to exist "whenever imports of an article like or directly competitive with an article produced by a domestic industry are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry." 19 U.S.C. § 2451(c).

The Section 421 procedures involve separate determinations by the USITC and potentially by the President, who is to make the actual decision whether or not to grant import relief after receiving a recommendation of the U.S. Trade Representative. To initiate the process, a domestic producer may petition the USITC to investigate whether a product of China is being imported into the United States in such increased quantities or under such conditions as to cause or

threaten to cause market disruption to domestic producers of like or directly competitive products. 19 U.S.C. § 2451(b).

The statute directs the USITC, upon making an affirmative determination of market disruption, to propose actions in the form of increased duties or other import restrictions necessary to prevent or remedy the market disruption. 19 U.S.C. § 2451(f). The statute further directs the U.S. Trade Representative, after receiving the report of the USITC, to publish in the Federal Register notice of any import relief measure the U.S. Trade Representative proposes to be taken and to invite public comment, with the opportunity to request a public hearing on the appropriateness of the proposed measure. 19 U.S.C. § 2451(h)(1). Further, the statute authorizes the U.S. Trade Representative to enter into agreements with the People's Republic of China under which China would take action to prevent or remedy market disruption and provides that the Trade Representative "should seek to conclude such agreements" within a 60-day period commencing five days after receiving an affirmative determination of the USITC. 19 U.S.C. § 2451(j)(1).

Section 421 vests in the President the discretion whether to provide import relief. Within 15 days of receiving the Trade Representative's final recommendation, the President is directed to provide import relief for the domestic industry "unless the President determines that provision of such relief is not in the national economic interest of the United States" or, in extraordinary cases, that it would cause serious harm to the national security. 19 U.S.C. § 2451(k)(1). The import relief may take the form of increased duties or other import restrictions and is to remain in effect "for such period as the President considers necessary to prevent or remedy the market disruption." 19 U.S.C. § 2451(a).

The President's discretion to deny import relief following an affirmative USITC finding of market disruption is subject to specific limitations. The statute provides that "[t]he President may determine . . . that providing import relief is not in the national economic interest of the United States only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. § 2451(k)(2).

In the proceedings leading up to this litigation, the USITC issued its report on the petition of Motion Systems on November 7, 2002, following the submission of briefs and a public hearing. *See Pedestal Actuators from China: Investigation No. TA–421–1*, USITC Pub. 3557. The USITC concluded in its report that pedestal actuators from China are being imported in such increased quantities or under such conditions as to cause market disruption to the domestic producers of like or directly competitive products. The USITC proposed, as a remedy to the market disruption it had found to exist, a three-year period of quantitative restrictions on Chinese pedestal actuator

imports, to consist of 5,626 units in the first year, 6,470 units in the second year, and 7,440 units in the third year.[1] *See International Trade Commission: Pedestal Actuators*, 67 Fed. Reg. 69,557, 69,558 (Nov. 18, 2002).

After seeking, unsuccessfully, an agreement with the People's Republic of China to prevent or remedy market disruption from pedestal actuator imports, and after inviting written comments[2] and conducting a public hearing, the U.S. Trade Representative submitted its recommendation to the President on January 2, 2003.[3] On January 17, 2003, the President issued a determination not to impose restrictive measures on imports of pedestal actuators from China.

B. The President's Decision to Deny Relief to the Domestic Pedestal Actuator Industry

The President's decision was released in the form of a Federal Register notice setting forth a memorandum to the U.S. Trade Representative ("USTR" or "Trade Representative").[4] The decision included the following findings: (1) providing import relief for the U.S. pedestal actuator industry is not in the national economic interest; and (2) import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action.

The presidential decision went on to state four reasons for the decision, as follows: (1) the facts indicate that the USITC's recommended quota would not likely benefit the domestic industry and instead would cause imports to shift to other offshore sources; (2) even if the quota were to benefit the primary domestic producer (*i.e.*, Motion Systems), the cost of the quota to consumers, downstream purchasers of pedestal actuators, and users of the downstream products would substantially outweigh any benefit to producers' income; (3) the cost of the quota would increase pressure on domestic producers of the downstream products (*i.e.*, mobility scooters and electric wheelchairs) to move offshore, causing more economic harm than good due to the larger number of workers in the downstream industry; and (4) the quota would negatively affect the many elderly and disabled purchasers of the downstream products. The portion of the

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[1] These quantitative limits were proposed by Vice Chairman Hillman and Commissioner Miller. As authorized by 19 U.S.C. § 2451(g)(2)(C), Commissioner Koplan separately proposed a three-year period of quantitative restrictions consisting of 4,425, 4,514, and 4,604 units per year, respectively. Chairman Okun and Commissioner Bragg made negative determinations concerning market disruption.

[2] Office of the U.S. Trade Representative, *Notice of Proposed Measure and Opportunity for Public Comment Pursuant to Section 421 of the Trade Act of 1974: Pedestal Actuators from the People's Republic of China*, 67 Fed. Reg. 71,007 (Nov. 27, 2002) ("*USTR Notice*").

[3] The U.S. Trade Representative did not make public, and was not required by Section 421 to make public, its recommendation to the President.

[4] The President, *Presidential Determination on Pedestal Actuator Imports from the People's Republic of China*, 68 Fed. Reg. 3,157 (Jan. 22, 2003).

presidential decision setting forth the two findings and the four aforementioned reasons reads as follows.

> After considering all relevant aspects of the investigation, I have determined that providing import relief for the U.S. pedestal actuator industry is not in the national economic interest of the United States. In particular, I find that the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action.
>
> In determining not to provide import relief, I considered its overall costs to the U.S. economy. The facts of this case indicate that imposing the USITC's recommended quota would not likely benefit the domestic producing industry and instead would cause imports to shift from China to other offshore sources.
>
> Even if the quota were to benefit the primary domestic producer, the cost of the quota to consumers, both the downstream purchasing industry and users of the downstream products, would substantially outweigh any benefit to producers' income. The USITC's analysis confirms this conclusion.
>
> In addition, downstream industries are already under pressure to migrate production offshore to compete with lower-cost imports of finished products. Higher component costs resulting from import relief would add to this pressure. Given the significantly larger number of workers in the downstream purchasing industry when compared with the domestic pedestal actuator industry, I find that imposing import restrictions would do more economic harm than good.
>
> Finally, a quota would negatively affect the many disabled and elderly purchasers of mobility scooters and electric wheelchairs, the primary ultimate consumers of pedestal actuators.

C. Motion Systems' Request for Reconsideration of the President's Decision

Following issuance of the President's decision to deny import relief on Chinese-origin pedestal actuators, Motion Systems filed with the U.S. Trade Representative a submission, dated February 12, 2003, requesting "reconsideration" of that decision and citing "new evidence which has come to light since January 17, the date of the President's determination." The "new evidence" consisted of documents that Motion Systems presented in support of claims that Electric Mobility did not reduce the prices of mobility scooters it sold to the Department of Veterans Affairs and did not make an electrically-powered seat lift (which incorporates a pedestal actuator) standard equipment on 70 percent of its models. Motion Systems contended

that this "new evidence" contradicted statements made by the president of Electric Mobility Corporation ("EMC"), Michael Flowers, before the USTR hearing and raised credibility concerns. The post-decision submission stated as follows:

> If EMC did not, in fact, include the seat lift as standard equipment on 70 percent of its scooters, then that calls into serious question Mr. Flowers' claim that EMC reduced the prices for those scooters as a result of switching to the lower-priced Chinese unit, particularly since Mr. Flowers acknowledged that EMC did not reduce the price of the seat lift as an option. And if it is the case that EMC did not, in fact, reduce the prices when it switched to the Chinese unit, then it calls into question the credibility of Mr. Flowers' claim that EMC would be forced to increase its prices $200 if relief were granted. Once Mr. Flowers' testimony is put aside, there is no evidence to indicate the extent to which the costs of relief would outweigh the benefits.

Stewart and Stewart letter to USTR, February 12, 2003 at 16–17, in Pl.'s Ex. 2.

In a letter to counsel for plaintiff dated March 7, 2003, the Assistant U.S. Trade Representative for North Asian Affairs, in an apparent reference to the February 12, 2003 submission, acknowledged with appreciation the "supplemental information you have provided" but did not indicate that the President would reconsider the decision to deny import relief. The March 7, 2003 letter stated, *inter alia*, that "[y]our letter points to evidence that, in your view, shows the sole U.S. purchaser of Chinese pedestal actuators, Electric Mobility, did not reduce prices for its mobility scooters and electric wheelchairs after it began sourcing pedestal actuators from China and thus did not pass along to consumers any cost savings." That letter went on to state that the issue whether Electric Mobility reduced its prices after purchasing Chinese pedestal actuators was clearly reflected "as disputed between the parties" in the materials before the President at the time of the President's decision, adding that "this issue relates only indirectly to the considerations identified by the President as dispositive in his decision." This action followed.

II. DISCUSSION

A. Subject Matter Jurisdiction

The court concludes that it is granted jurisdiction over the instant action by 28 U.S.C. § 1581(i). Under paragraphs (2)–(4) of subsection (i) of § 1581, this Court has exclusive jurisdiction of civil actions commenced against the United States, its agencies, or its officers that arise out of any law of the United States providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" [paragraph (2)], "embar-

goes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety" [paragraph (3)], or "administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection. . . ." [Paragraph (4)].

Section 421 provides for increased tariffs for reasons other than raising revenue, specifically, for preventing or remedying market disruption adversely affecting a domestic industry. It also authorizes quantitative import restrictions to serve these same purposes, which are reasons "other than the protection of the public health or safety." Plaintiff has commenced an action against the President of the United States and the U.S. Trade Representative, both of whom are officers of the United States. With respect to the President, status as an officer of the United States stems from the Constitution itself, for the President is the essential constitutional officer under Article II of the Constitution. "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years. . . ." U.S. CONST., Art. II, § 1. "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). The court concludes, therefore, that this action falls squarely within the express terms of the jurisdictional provisions in § 1581(i)(2) and (i)(3).

Defendants move to dismiss this action for lack of subject matter jurisdiction, advancing an argument based on two contentions. Defendants contend, first, that the President must be dismissed from this action, relying on the recent decision of the United States Court of Appeals for the Federal Circuit in *Corus Group PLC v. Int'l Trade Comm'n*. 352 F.3d 1351 (Fed. Cir. 2003). Specifically, defendants interpret *Corus Group* to require that a challenge such as this to a presidential decision be dismissed for lack of subject matter jurisdiction because of the Federal Circuit's statement in *Corus Group* that "section 1581(i) does not authorize proceedings directly against the President." *Id.*, 352 F.3d at 1359. The second contention by defendants is that this case may not proceed as a challenge to an action of the U.S. Trade Representative, who in the statutory Section 421 procedure performs the role of advising the President regarding import relief. Defendants argue that this Court, lacking "jurisdiction to entertain plaintiff's claims against the President, likewise lacks jurisdiction to entertain challenges to the President's advisors." *Defs.' Mot. to Dismiss* at 3. According to their argument, the U.S. Trade Representative's recommendation to the President addressing the issue of import relief is purely advisory, rather than determinative of legal rights, and hence it is unreviewable under principles announced by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), and cited by the Federal Circuit in *Corus Group*.

Having contended that this action may be brought neither against the President nor against the U.S. Trade Representative, defendants conclude that this court must dismiss this case for lack of subject matter jurisdiction.

The court disagrees with defendants' jurisdictional analysis for two reasons. First, if this court were to construe the Federal Circuit's decision in *Corus Group* to require dismissal of this action, it would be acting contrary to the jurisdictional principles applied by the Federal Circuit in a line of cases in which presidential action was challenged directly, including *Humane Society of the United States v. Clinton*, 236 F.3d 1320 (Fed. Cir. 2001), a decision not overturned by *Corus Group*. *See Corus Group*, 352 F.3d at 1359–1360. Second, were the court to accept defendants' reasoning, it would be holding, in the particular posture of this case, that decisions by the President to deny import relief pursuant to authority delegated by Congress in Section 421 are entirely outside the scope of judicial review under 28 U.S.C § 1581(i). Such a holding, which would go beyond the holding in *Corus Group*, cannot be reconciled with the express language of § 1581(i). These two points are discussed below.

In *Corus Group*, the Court of Appeals for the Federal Circuit concluded that the Court of International Trade should have dismissed the President from an action brought under 28 U.S.C. § 1581(i) challenging certain decisions made during an "escape clause" proceeding affecting steel imports that was conducted under section 201 of the Trade Act of 1974. The Court of Appeals reasoned that § 1581(i) does not authorize proceedings directly against the President, observing that it "refers only to actions 'against the United States, its agencies, or its officers' and does not specifically include the President." 352 F.3d at 1359. The Court of Appeals in *Corus Group* held that the Court of International Trade nevertheless had jurisdiction over the subject matter of the dispute under 28 U.S.C. § 1581(i) and concluded that relief still could have been sought against the Commissioner of Customs, who along with the President and the U.S. International Trade Commission was named as a defendant. The Court of Appeals observed that had plaintiffs prevailed, the Customs Commissioner could have been enjoined from collecting duties, as proclaimed by the President under the escape clause, on the imported tin mill steel products that were at issue in the case. *Id.*

In *Humane Society of the United States v. Clinton*, as in *Corus Group*, plaintiffs sought relief against, and named as defendants, the President of the United States and other government officials (in that case, the Secretaries of State and Commerce). The plaintiffs in *Humane Society* sued the government officials for their alleged failure to comply with the Driftnet Fishing Act, 16 U.S.C. §§ 1826–1826g. *See Humane Society*, 236 F.3d at 1323. Specifically, plaintiffs appealed from a decision of this Court refusing to issue a writ of mandamus ordering the President to impose sanctions on Italy for

large-scale driftnet fishing and refusing to find arbitrary and capricious a certification by the Secretary of Commerce that large-scale driftnet fishing during a specified time period had been terminated by Italy. *See id.* Plaintiffs had brought their case in this Court under 28 U.S.C. § 1581(i).

The defendants in *Humane Society* sought dismissal on the ground that "there has been no waiver of sovereign immunity by the United States." 236 F.3d at 1325. The Court of Appeals for the Federal Circuit, observing that "[s]overeign immunity and subject matter jurisdiction are related but different juridical concepts," *id.* at 1326, further observed that "[u]nless the grant of jurisdiction carries with it a coextensive waiver of sovereign immunity, the Congressional grant would be a hollow act, with no significant consequences to the sovereign, and no significant benefits to the sovereign's subjects." *Id.* at 1328. Analogizing to the Supreme Court's analysis of jurisdiction and waiver of sovereign immunity under the Tucker Act in *United States v. Mitchell*, 463 U.S. 206 (1983), the Federal Circuit concluded in *Humane Society* that 28 U.S.C. § 1581 "not only states the jurisdictional grant to the Court of International Trade, but also provides a waiver of sovereign immunity over the specified class of cases." 236 F.3d at 1328. The Court of Appeals further concluded in *Humane Society* that "[t]he Court of International Trade properly exercised jurisdiction over this case." *Id.*

With respect to the scope of the jurisdictional grant in 28 U.S.C. § 1581(i), the decision of the Court of Appeals in *Humane Society* was consistent with a line of previous decisions in which challenges to presidential action pursuant to tariff statutes were brought thereunder. In its opinion in *Humane Society*, the Court of Appeals noted with approval the plaintiffs' citation of "numerous cases in which the Court of International Trade has since considered challenges to the actions of the President pursuant to the grant of jurisdiction in § 1581(i). *See, e.g.*, *Florsheim Shoe Co. v. United States*, 744 F.2d 787 (Fed. Cir. 1984); *United States Cane Sugar Refiners' Ass'n v. Block*, 69 C.C.P.A. 172, 683 F.2d 399 (1982); *Kemet Electronics Corp. v. Barshefsky*, 976 F. Supp. 1012 (CIT 1997); *Luggage & Leather Goods Mfrs. of America, Inc. v. United States*, 588 F. Supp. 1413 (CIT 1984)." 236 F.3d at 1327. This court cannot adopt the interpretation of *Corus Group* advanced by defendants and, at the same time, adhere to the jurisdictional principles set forth in *Humane Society* and the predecessor cases in which presidential actions were challenged pursuant to 28 U.S.C. § 1581(i). Nor is this court able to reconcile the construction of § 1581(i) advanced by defendants with the plain meaning of that statutory provision.

As noted above, *Corus Group* did not overturn *Humane Society*. *See Corus Group*, 352 F.3d at 1359–1360. Furthermore, it did not overturn the previous cases identified in *Humane Society* as "numerous cases in which the Court of International Trade has since consid-

ered challenges to the actions of the President pursuant to the grant of jurisdiction in § 1581(i)." *Humane Society*, 236 F.3d at 1327. Moreover, under precedent of the Court of Appeals for the Federal Circuit, these earlier decisions may be overturned only *en banc*. *See Sacco v. Dep't of Justice*, 317 F.3d 1384, 1386 (Fed. Cir. 2003) (*citing Newell Companies, Inc. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) ("A panel of this court is bound by prior precedential decisions unless and until overturned *en banc*.")). To the extent of any conflict between the decision in *Corus Group* and the decision in *Humane Society*, this court concludes that it should follow the earlier decision, because a decision of one panel of the Court of Appeals for the Federal Circuit should not be read to overturn the decision of a previous panel. "Where there is a direct conflict, the precedential decision is the first." *Newell Companies, Inc.*, 864 F.2d at 765 (Fed. Cir. 1988).

The second part of defendants' argument on jurisdiction is that the recommendation of the U.S. Trade Representative in the administrative proceeding was purely advisory, rather than determinative of legal rights, and hence is unreviewable under principles announced by the Supreme Court in *Bennett v. Spear*, 520 U.S. at 177–78, and cited by the Federal Circuit in *Corus Group*. Having contended that this court lacks subject matter jurisdiction over an action brought directly against the President and that the Trade Representative's action cannot be challenged, defendants present what is in effect an argument that this Court lacks subject matter jurisdiction because there is no officer of the United States against whom relief may be sought. The court finds this argument unpersuasive.

As confirmed by the jurisdictional analyses in *Humane Society* and in prior decisions involving challenges to presidential action under trade statutes, 28 U.S.C. § 1581(i) provides subject matter jurisdiction in this Court over a challenge such as this to final presidential action taken under Section 421. Accordingly, the court need not reach the issue whether the Trade Representative's recommendation to the President, standing by itself, would have been appealable in this forum as a final decision, or, alternatively, "purely advisory" under principles advanced in *Bennett v. Spear*. *See Bennett v. Spear*, 520 U.S. at 178. The procedural actions taken by the Office of the U.S. Trade Representative are challenged in this proceeding. They are reviewable pursuant to the subject matter jurisdiction of this Court as procedural predicates to the final presidential action. *See Dalton v. Specter*, 511 U.S. 462, 478 (1994) (Blackmun, J., concurring in part and concurring in the judgment); *see also Fed. Trade Comm'n v. Standard Oil of Calif.*, 449 U.S. 232, 244–245 (1980) (Preliminary decision to issue complaint by Federal Trade Commission is not insulated by finality requirement, and "a court of appeals reviewing a [final] cease-and-desist order has the power to review alleged unlawfulness in the [preliminary] issuance of the complaint.").

Furthermore, were this court to accept the two premises of defendants' jurisdictional argument, subject matter jurisdiction would be found to exist in this Court where a challenge is brought to a presidential decision granting import relief under Section 421 but not where the challenge is brought against a presidential decision denying such relief. Where the action challenged is one in which the President granted import relief, the Commissioner of Customs could be enjoined from collecting duties or from excluding merchandise from entry. Where, as here, the President denied such relief, defendants' construction of § 1581(i) would leave no officer of the United States who could be sued. Support for such an anomalous distinction can be found neither in the language of 28 U.S.C. § 1581(i) nor in the congressional purpose underlying this jurisdictional provision. The jurisdictional bifurcation that would be created by defendants' interpretation of § 1581(i) would appear to blur the distinctions between subject matter jurisdiction and personal jurisdiction. It also would lead to confusion of the type Congress intended to prevent when it included 28 U.S.C. § 1581(i) as part of the Customs Courts Act of 1980, Pub. L. 96–417. As the Court of Appeals for the Federal Circuit observed in *American Association of Exporters and Importers–Textile and Apparel Group v. United States*, 751 F.2d 1239, 1245–46 (Fed. Cir. 1985), that intent was "to establish clear rules and to center international trade litigation in the CIT."

For the foregoing reasons, this court rejects the interpretations of § 1581(i) and of *Corus Group* that are advanced by defendants. Defendants' motion to dismiss for lack of subject matter jurisdiction is denied.

B. Summary Judgment and Judgment on an Agency Record

In seeking dismissal of this action, defendants have moved for judgment on an agency record pursuant to USCIT Rule 56.1, "Judgment Upon an Agency Record for an Action Other Than That Described in 28 U.S.C. § 1581(c)." Subsection (a) of that Rule provides, in pertinent part, that "where a party believes that the determination of the court is to be made solely upon the basis of the record made before an agency, that party may move for judgment in its favor upon all or any part of the agency determination." In this action, however, the determination of the court cannot be made solely on the basis of the record made before an agency, because the decision under review is that of the President, not that of an administrative agency. For the same reason, this case cannot be decided on the basis of judgment "upon all or any part of the agency determination." Therefore, the subject matter of Rule 56.1 does not precisely describe the issue pending before the court.

This case presents no genuine issue as to any material fact. Both plaintiff and defendants are seeking judgment as a matter of law. Specifically, plaintiff Motion Systems seeks an order granting it

judgment on the record setting aside the President's determination not to grant relief from imports. Defendants and defendant-intervenor CCL Industrial Motor Ltd. seek judgment as a matter of law dismissing this action. These circumstances are within the ambit of Rule 56, Summary Judgment.[5] Accordingly, the court will consider defendants' motion as a motion for summary judgment under USCIT Rule 56 and, similarly, treat the submission of plaintiff opposing defendants' motion as a cross motion for summary judgment.[6]

C. Standard of Review for Presidential Actions under Trade Statutes

In reviewing final actions of the President, courts have applied a standard of review considerably narrower and more deferential than the standards most often accorded to final actions by administrative agencies, which Congress has subjected generally to standards of review prescribed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The APA provisions include the standard of review commonly referred to as the "arbitrary and capricious" or "abuse of discretion" standard, under which a court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

For cases brought under 28 U.S.C. § 1581(i), 28 U.S.C. § 2640 refers this court to the APA, providing that the court "shall review the matter as provided in section 706 of title 5." However, 5 U.S.C. § 706 is expressly confined to the review of an "agency action." As the Supreme Court recognized in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), "the President is not an agency within the meaning of the Act," concluding in that instance that "there is no final agency action

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[5] USCIT R. 56(c) states, in the relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[6] At oral argument held October 22, 2003, the parties indicated that they do not oppose the court's consideration of the relief sought by defendants and plaintiff as a motion and cross motion, respectively, for summary judgment under Rule 56. *Oral Arg. Tr.* at 64 – 66. Subsequent to oral argument, plaintiff filed with the court a letter, dated November 18, 2003, stating that plaintiff now considered summary judgment to be inappropriate and seeking to "withdraw any concession that consideration under Rule 56 is in order." In its opposition to defendants' motion under Rule 56.1, plaintiff had acknowledged that "[t]here are no material issues of fact in issue in this action" and sought judgment on the record in its favor. Plaintiff has not sought to amend its pleadings. Most significantly, plaintiff's letter of November 18, 2003 does not establish that this case presents a genuine issue as to any material fact. Under these circumstances, Rule 56 is the applicable rule under which this case is to be decided.

that may be reviewed under the APA standards." *Id.* at 796. The *Franklin* Court reasoned as follows:

> The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800–801. "Although the President's actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA. . . ." *Id.* at 801 (citations omitted).

Franklin v. Massachusetts involved a judicial challenge to presidential action under the statutory congressional reapportionment provisions. When reviewing presidential actions taken under the authority of tariff statutes, courts also have limited the scope of their reviews, noting in particular the relationship between actions taken under tariff statutes and the President's unique role in foreign affairs. In *Maple Leaf Fish Co. v. United States*, 762 F.2d 86 (Fed. Cir. 1985), the Court of Appeals for the Federal Circuit stated as follows:

> In international trade controversies of this highly discretionary kind–involving the President and foreign affairs–this court and its predecessors have often reiterated the very limited role of reviewing courts. *See, e.g., American Association of Exporters and Importers v. United States*, 751 F.2d 1239, 1248–49 (Fed. Cir. 1984); *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 793 795–97 (Fed. Cir. 1984). For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.

762 F.2d at 89. *Maple Leaf Fish Co.* involved the review of presidential action under the "escape clause" established by section 201 of the Trade Act of 1974, 19 U.S.C. §§ 2251–53. In *Florsheim Shoe Co.*, the Federal Circuit applied essentially the same standard of review in considering a challenge to the President's exercise of authority under the Generalized System of Preferences ("GSP") program (specifically, Section 504 of Title V of the Trade Act of 1974, 19 U.S.C. § 2464) to limit duty-free tariff treatment for a certain class of imported goods. The Federal Circuit in *Florsheim Shoe Co.* concluded that "[b]oth the Supreme Court and Court of Customs and Patent Appeals precedent have established that the Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the

President's action conforms with the relevant procedural requirements." *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (1984). The court further concluded that "[t]he President's findings of fact and the motivations for his action are not subject to review." *Id.* (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940); *United States Cane Sugar Refiners' Association v. Block*, 683 F.2d at 404; *Aimcee Wholesale Corp. v. United States*, 468 F.2d 202, 206 (CCPA 1972)).

As do the trade enactments at issue in *Maple Leaf Fish Co.*, *supra*, and *Florsheim Shoe Co.*, *supra*, Section 421 grants the President considerable discretion. The President may decide to provide import relief to the domestic industry, or, after making certain findings, may decide not to do so. If he decides to provide such relief, he may do so by means of "increased duties or other import restrictions." Section 421(a), 19 U.S.C. § 2451(a). The time period for the relief is also left to the President's discretion; the relief is to remain in effect "for such period as the President considers necessary to prevent or remedy the market disruption." *Id.*

Section 421 does not indicate congressional intent to subject the President's determinations thereunder to an APA "abuse of discretion" or similar standard. Therefore, in reviewing the President's determination of January 17, 2003 not to proclaim restrictive measures on imports of pedestal actuators from China, this court will uphold the President's action absent "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89.

D. Analysis of the President's Decision under the Applicable Standard of Review

1. Construction of the Governing Statute and Action Within Delegated Authority

This court finds no basis to conclude that the January 17, 2003 decision not to grant import relief to the U.S. pedestal actuator industry is based on a misconstruction of Section 421. The decision is consistent with the statute with respect to the types of factual determinations that are required to support a denial of import relief to a domestic industry and with respect to the requirement that the published decision include the "reasons therefor." Moreover, because it contains a specific determination and a specific finding responsive to the statutory criteria for denying relief and presents reasons that are sufficient under the applicable standard for judicial review, the President's decision did not exceed the authority delegated by Congress in Section 421.

The aforementioned statutory criteria are set forth in Section 421(k). Section 421(k)(1) requires that a decision denying import relief be based on a presidential determination that provision of relief

is "not in the national economic interest of the United States, or, in extraordinary cases, that the taking of action pursuant to subsection (a) of this section would cause serious harm to the national security of the United States." 19 U.S.C. § 2451(k)(1). If the President decides to deny relief under the "economic interest" criterion as opposed to the "national security" criterion, the President may do so only upon a presidential finding under Section 421(k)(2) that "the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. § 2451(k)(2).

The President's January 17, 2003 decision contains a presidential determination under the economic interest criterion: "After considering all relevant aspects of the investigation, I have determined that providing import relief for the U.S. pedestal actuator industry is not in the national economic interest of the United States." The decision also contains a presidential finding that "the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action." Finally, with respect to the President's decision to deny relief, the notice states "reasons therefor."

This court's consideration of the reasons stated in the presidential decision must be informed by the degree of deference to be accorded to the President under the applicable standard of review. As discussed previously, "[t]he President's findings of fact and the motivations for his action are not subject to review." *Florsheim Shoe Co. v. United States*, 744 F.2d at 795. Although the President must state reasons for his decision, those reasons are not to be reviewed in this court under the "abuse of discretion" standard of 5 U.S.C. § 706(2)(A), nor are the underlying findings of fact to be subjected to a standard such as the "substantial evidence" standard described in 5 U.S.C. § 706(2)(E).

The reasons set forth in the President's notice refer to factual matters that were before the President as a result of the investigation conducted by the USITC. They relate specifically to the statutory "economic interest" criterion and the statutory requirement that denial of relief under that criterion be based on a presidential finding that "the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." As a result, they are directed to the specific determination and finding which, under the plain meaning of Section 421(k), must guide the exercise of presidential discretion to deny relief. Having made both the "economic interest" determination required by subsection (k)(1) and the finding under subsection (k)(2) that imposing import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action, and having presented reasons for his decision in the published notice that are sufficient under the applicable standard for judicial review, the

President was acting within the boundaries of the discretion Congress delegated to him in deciding not to impose import relief for the domestic pedestal actuator industry.

Motion Systems contends that the President, in denying import relief following the affirmative determination of market disruption by the USITC, both misconstrued Section 421 and exceeded his authority thereunder. Once the USITC has made such a determination, plaintiff argues, the President "is acting under a mandate to provide relief," unless the President invokes what plaintiff views "is meant to be a rare exception to that relief." *Pl.'s Br. in Supp. of its Opp. to Defs.' Mot. for Summ. J. upon an Agency R.* ("*Pl.'s Br.*") at 28. In plaintiff's view, the statute creates a presumption of relief in the use of the words "shall . . . proclaim" in subsection (a) of Section 421, under which the President, following an affirmative USITC determination, "shall, in accordance with the provisions of this section, proclaim increased duties or other import restrictions." *Pl.'s Br.* at 24. Motion Systems finds further support for its interpretation in the language of subsection (j)(2) of Section 421, which provides that the President, in the absence of an agreement with the People's Republic of China, "shall provide import relief in accordance with subsection (a) of this section." *Id.*

In asserting that the provision in subsection (k)(2) of Section 421 "is meant to be a rare exception" to relief, Motion Systems places emphasis on the words "clearly greater" as used therein ("The President may determine under paragraph (1) that providing import relief is not in the national economic interest of the United States only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action"). Based on the words "clearly greater" as used in subsection (k)(2), plaintiff construes the statute to require that "[i]n order to support a denial of relief . . . the evidence supporting the denial must be 'clear,' or beyond a reasonable doubt" and that "the burden was on the President to make such a negative determination only where such more-than-substantial evidence was produced." *Pl.'s Br.* at 3. Plaintiff further contends that "[t]he record must contain evidence quantifying the adverse economic impact on the United States economy of providing such relief, not mere conjecture that there might be some adverse impact." *Id.* Regarding benefits of relief, plaintiff argues that "[t]he President has simply not examined or quantified the benefits of relief, and thus the Court cannot sustain his determination that the adverse impact on the United States economy of providing the recommended import relief would be greater than those benefits." *Pl.'s Br.* at 46.

The court does not agree with plaintiff's construction of Section 421. Subsection (k)(2) describes the nature of the presidential finding that must precede a presidential determination that providing import relief is not in the national economic interest. It does not im-

pose on the President a burden to establish or support that finding with "evidence quantifying the adverse economic impact," "evidence beyond a reasonable doubt," "clear and convincing evidence," or "more-than-substantial evidence." The provision itself makes no reference to evidence or burden of proof. Nor does it indicate congressional intent to impose a standard of review different from that which the courts consistently have applied in the judicial review of presidential action under tariff statutes.

The use of the words "shall . . . proclaim" and "shall provide" in subsections (a) and (j)(2) of Section 421, respectively, when read together with subsection (k)(2), do not impose on the President the evidentiary requirements that plaintiff ascribes to these statutory provisions. The words "shall . . . proclaim increased import duties or other restrictions," as used in subsection (a), are expressly qualified with the phrase "in accordance with the provisions of this section," which includes the exceptions provided for in subsections (k)(1) and (k)(2). Similarly, the "shall provide" language of subsection (j)(2) incorporates the same exceptions through the use of the phrase "in accordance with subsection (a) of this section."

A judicial inquiry commensurate with plaintiff's construction of the statute would require this court to evaluate the sufficiency of the evidence underlying the President's findings. That is not within the court's power. Again, "[t]he President's findings of fact and the motivations for his action are not subject to review." *Florsheim Shoe Co.*, 744 F.2d at 795.

Plaintiff relies on a number of cases for its contention that the President's findings should be subjected upon judicial review to a "clear and convincing" evidentiary standard. The cited cases include *Finnigan Corp. v. Int'l Trade Comm'n.*, 180 F.3d 1354, 1366 n.8 (1999) (The applicable standard for determining existence of invalidating activities in a patent case is "clear, satisfactory and beyond a reasonable doubt," which is "indistinguishable from the more modern parlance of 'clear and convincing' evidence."); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (Appellate review of a trial court's findings of fact will be affirmed unless "clearly erroneous."); *Connor v. United States*, 24 CIT 195, 198 (2000) (To establish jurisdiction under 28 U.S.C. § 1581(h) plaintiff must show by clear and convincing evidence that the immediate threat of a harm occurring exists.). The cases cited by plaintiff are unavailing. None establishes a rule of law under which this court, based on the effect of statutory words such as "clearly greater" or any words to similar effect, is to subject presidential findings to a substantial evidence test or a more stringent test requiring "clear and convincing" evidence or evidence "beyond a reasonable doubt."

In summary, the President's decision of January 17, 2003 contains the determination and the finding required by Section 421 to support a denial of import relief and presents "reasons therefor" that are

sufficient to support that decision under the applicable standard for judicial review. The court finds no basis to conclude that the President's decision is based on "a clear misconstruction of the governing statute" or that it constituted "action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89.

2. Compliance with Procedures

The President's decision not to impose import relief for the pedestal actuator industry is subject to review by this court to determine "whether the President's action conforms with the relevant procedural requirements." *Florsheim Shoe Co.*, 744 F.2d at 795. As to review of procedure, the Court of Appeals for the Federal Circuit stated in *Maple Leaf Fish Co.* that "[f]or a court to interpose, there has to be . . . a significant procedural violation." 762 F.2d at 89. The court finds no such violation.

The Section 421 proceeding involved an affirmative finding by the USITC of market disruption and a proposed remedy by the USITC, pursuant to Section 421(g). If the U.S. Trade Representative proposes a measure to prevent or remedy the market disruption found by the USITC to exist, the Trade Representative is required by Section 421(h) to publish notice of that measure in the Federal Register and "of the opportunity, including a public hearing, if requested, for importers, exporters, and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest." 19 U.S.C. § 2451(h)(1). In this proceeding, the Trade Representative's notice proposes the remedy recommended by the USITC "for further consideration by domestic producers, importers, exporters, and other interested parties, and invites any of these parties to submit their views and evidence on the appropriateness of the proposed remedy and whether it would be in the public interest." *USTR Notice*, 67 Fed. Reg. at 71,008.[7] At the request of Motion Systems, the U.S. Trade Representative conducted a public hearing, which was held on December 18, 2002. Thus, the Trade Representative's procedures satisfied the basic procedural requirements of the statute for public notice and comment and for a public hearing.

Motion Systems raises two objections to the Trade Representative's conduct of the hearing. First, Motion Systems asserts that the hearing procedures were not strict enough to prevent Electric Mobil-

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[7] The notice also requested public comment "on other possible actions, including: imposition of a quota on imports of pedestal actuators from China, with a quantity and/or duration different from the USITC recommendation; imposition of a tariff-rate quota on imports of pedestal actuators from China; increased duties on imports of pedestal actuators from China; an import monitoring mechanism; or no import relief (pursuant to a determination under Section 421(k) of the Trade Act regarding the national economic interest or national security)." *USTR Notice*, 67 Fed. Reg. at 71,008.

ity Corporation from placing on the record "views," rather than "hard evidence," which views Motion Systems asserts would have been exposed as false if subjected to "cross-examination." *Pl.'s Br.* at 52–53. Plaintiff contends that the less-than-formal procedures allowed Electric Mobility to place on the record statements indicating that Electric Mobility's switch to a Chinese supplier of actuators had reduced the price of that company's scooters. In testimony at the Trade Representative's hearing, the president of Electric Mobility, Mr. Michael Flowers, stated that when Electric Mobility switched its sourcing of pedestal actuators from Motion Systems to the Chinese supplier it reduced the price of its Rascal Scooter by over $300. A.R. Ex. IV at 7–8. Mr. Flowers followed that statement with the statement that he "believe[d] the import quotas recommended will increase our average sale price by at least $200 next year. . . ." *Id.* at 8.

Motion Systems, in a post-hearing submission, challenged the credibility of Mr. Flowers's testimony on several points. A.R. Ex. V, Comment 29. On the specific issue of price, Motion Systems claimed that Electric Mobility had not reduced its scooter prices after the change to the Chinese supplier. *Id.* Motions Systems placed two documents on the record to support its claim. The first document is a transcript of a hearing from a different federal court proceeding in which another company official of Electric Mobility, Mr. George Flowers, stated that the company had not sought out a cheaper supplier for the purpose of passing along savings to consumers. *Id.* The second document is an article by an unidentified author that is described as having appeared on the website www.geocities.com/stuportner/files/news.htm with the headline "Electric Mobility To No Longer Sell Through Dealers." The article states that "by going direct, Electric Mobility can sell its popular Rascal scooter for $4,000 –$5,000, compared to the roughly $2,900 dealers sell them for, sources say." *Id.* Motion Systems, before this court, claims that by allowing Mr. Flowers to place on the record "unsubstantiated" testimony, not based on "hard evidence" and contradicted by documents on the record, the process allowed incorrect statements on the record, without which the President's findings cannot be affirmed. Motion Systems reasons that Electric Mobility's alleged failure to lower the price in the absence of import quotas undermines the contention that imposing import quotas will result in increased prices.

The second procedural violation plaintiff claims is that the advance "notice" Electric Mobility gave of its intended presentation at the hearing was misleading. The Federal Register notice of the hearing had requested that parties intending to appear provide "a brief summary of the comments to be presented." *USTR Notice*, 67 Fed. Reg. at 71,008. Electric Mobility filed a letter stating that its president, Michael Flowers, would testify. It summarized Mr. Flowers's comments as follows:

> Mr. Flowers will testify that Electric Mobility is the only purchaser of the actuators at issue, and that, no matter what remedy is imposed, Electric Mobility will not resume purchases from Motion Systems. He will also testify that the imposition of import restrictions would harm the domestic economy and cause additional burdens to the elderly and mobility-impaired.

A.R. Ex. III, Patton Boggs letter, Dec. 11, 2002. Motion Systems claims that Mr. Flowers's discussion at the hearing of the probability of increased prices for mobility scooters if the proposed import relief were granted was outside the scope of the summary and, therefore, improperly before the U.S. Trade Representative. *See Pl.'s Br.* at 54–55.

Plaintiff's first procedural objection is not a sufficient basis upon which this court may overturn or otherwise disturb the presidential decision. The Trade Representative's procedures afforded interested parties the opportunity to be heard in the precise manner required by Section 421(h). Although Motion Systems may have desired a more trial-like hearing with sworn testimony and cross-examination, nothing in the statute required such procedures.

So long as it satisfies the specific statutory requirements and adheres to "fundamentals of fair play," an agency has considerable latitude over its method of inquiry. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143–144 (1940). The Supreme Court has expressed this principle as follows:

> But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "

Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 543–544 (1978) (quoting *FCC v. Schreiber*, 381 U.S. 280, 290 (1965), in turn quoting from *FCC v. Pottsville Broad. Co.*, 309 U.S. at 143). In this case, the Trade Representative's procedures allowed witnesses to make extensive statements at a public hearing and allowed participating parties to submit supporting material. The President was free to consider the statements submitted, weigh their credibility, and ignore irrelevant submissions. Motion Systems was afforded the opportunity in a post-hearing submission to respond to the entire case made by the importer, the Chinese manufacturer, and the Chinese government. Its objections to the placing of the "views" of Electric Mobility on the record and to its lack of an opportunity to cross-examine Electric Mobility's witness do not establish, in the words of the opinion in *Maple Leaf Fish Co.*, a "significant procedural violation." 762 F.2d at 89.

Plaintiff's second claimed procedural error, that the "notice" given by Electric Mobility with regard to its presentation at the Trade Rep-

resentative's hearing was misleading, also fails to suffice as a basis to invalidate the President's decision. Electric Mobility's pre-hearing summary indicated that Mr. Flowers would discuss harm to the domestic economy and "additional burdens" to consumers of the downstream products. Prices for the downstream products are among the subjects relevant to the topic of "additional burdens" referred to in the pre-hearing letter filed by Electric Mobility. In addition, Motion Systems had the opportunity to make a post-hearing submission to the Trade Representative with the potential to cure the effect of any unfair surprise Motion Systems may have encountered because of the content of Mr. Flowers's testimony. Motion Systems in fact made a post-hearing comment submission in which it contested the validity of Mr. Flowers's statements about the price of the downstream products. A.R. Ex. V, Comment 29. That submission was part of the record available for the President's consideration.

With respect to both of its objections to the Trade Representative's hearing, plaintiff has not established a procedural irregularity that denied it fundamental fairness, nor is it able to show that it was harmed by the procedural errors it alleges. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings.").

E. Other Challenges by Motion Systems to the President's Decision

In addition to its challenge to the President's construction of Section 421, its claim that the President exceeded his authority thereunder, and its objections to the Trade Representative's hearing procedure, Motion Systems raises two challenges to the President's decision and decision-making process, which the court summarizes as follows: (1) the President and the Trade Representative improperly considered "political factors" after the close of the statutory U.S.-China consultation period; and (2) the President was required to reopen the proceeding after the submission of additional evidence by Motion Systems in rebuttal to information submitted by Electric Mobility.

1. The President Is Not Prohibited from Considering "Political Factors."

Plaintiff alleges that the President and the U.S. Trade Representative acted improperly in considering what it terms "political factors" after the conclusion of the period identified by Section 421(j)(1) for consultations with China. In support of its claim, Motion Systems points to a comment letter submitted to the Trade Representative by the Embassy of the People's Republic of China and testimony at the Trade Representative's hearing by an official of the People's Republic of China, each of which, according to plaintiff, "argued that proceed-

ing under this provision [*i.e.*, Section 421] threatened 'harm to China-U.S. trade and economic relations.' " *Pl.'s Br.* at 50–51, 51 n.34.

Plaintiff submits that consideration of such "political factors" was improper after the consultation period and that the President was then required to confine his consideration to "economic factors." Under Section 421(j)(1), "[t]he Trade Representative is authorized to enter into agreements for the People's Republic of China to take such action as necessary to prevent or remedy market disruption, and should seek to conclude such agreements before the expiration of the 60-day consultation period" provided for in the Protocol of Accession of the People's Republic of China to the World Trade Organization. If no agreement is reached, or if the President "determines tha[t] an agreement reached . . . is not preventing or remedying the market disruption," then the President is directed to provide import relief in accordance with subsection (a) of Section 421. 19 U.S.C. § 2451(j)(2). Motion Systems argues that, subsequent to the consultation period, "[t]hreats of retaliation by China for application of the provisions of the law whose enactment it agreed to as a condition of support for Chinese accession to the WTO were improperly entertained and considered by USTR and the President." *Pl.'s Br.* at 50–51.

The court finds no merit in plaintiff's argument regarding "political factors." Neither the record before the court nor the text of the President's decision establishes that trade relations between the United States and China were a factor in the President's decision. Regardless, the court finds nothing in Section 421 that would have prohibited the President from considering a wide range of factors, including an effect on trade relations between the United States and China, in determining whether there would be an adverse impact on the U.S. economy clearly greater than the benefits of granting relief. Nor does the court perceive any violation of Section 421 in the actions of the Trade Representative that included the Embassy letter in the record and that allowed the testimony of the official of the People's Republic of China. In enacting Section 421, Congress gave no indication of an intent to interfere with the Executive Branch function of communicating with foreign governments.

2. The President Was Not Required to Reopen the Proceedings.

Motion Systems argues that "[w]here, as here, the President's decision is based on testimony that is itself erroneous . . . there is an obligation to re-consider that decision in light of the new information that has come to light," adding that "[o]therwise, the integrity of a section 421 proceeding, including in particular the President's decision on remedy, is compromised and justice is denied." *Pl.'s Br.* at 60. In its post-decision submission, plaintiff cited as the "new information" price lists from the Department of Veteran Affairs for Electric Mobility's scooters indicating that Electric Mobility did not decrease

the prices of its downstream mobility scooters after it switched to the Chinese pedestal actuator supplier and that Electric Mobility did not make the "seat lift" standard equipment on 70 percent of its scooters. Plaintiff contends that these price lists establish that the testimony by Electric Mobility's president at the hearing conducted by the office of the U.S. Trade Representative was incorrect or misleading.

The matter raised in plaintiff's post-decision submission does not suffice as a basis upon which this court may compel the President or the Trade Representative to reopen the proceedings for reconsideration of the President's final decision. Plaintiff correctly observes that administrative bodies have the authority to reconsider their decisions based on a showing of perjury or fraud. *See Pl.'s Br.* at 58 (citing *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9 (2d Cir. 1981)); *see also Elkem Metals Co. v. United States*, 26 CIT ___ , ___ , 193 F. Supp. 2d 1314, 1320 (2002). However, the decision to reconsider is one left to the agency in question. A court will not disturb the decision of the agency not to reconsider, except upon a showing of abuse of discretion. *See United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946). Even more deference likely would be due a decision not to reconsider a final action taken by the President.

Plaintiff has not made a showing that the President or the Trade Representative committed an abuse of discretion following issuance of the final presidential decision. In its post-decision submission, Motion Systems addressed a general subject that the party already had addressed in its post-hearing submission and that was not pivotal to the reasons underlying the President's decision as stated by the President in the Federal Register notice of January 22, 2003. Accordingly, the "new information" offered in the post-decision submission does not establish that the President's final decision was, as plaintiff alleges, "*based on* testimony that is itself erroneous." (Emphasis added). Nor does it present facts that would compel the President, in the exercise of his overall discretion as granted by Congress in Section 421, to reach a different decision.

The Assistant Trade Representative's letter following plaintiff's post-decision submission responded that the issue raised in that submission was neither novel nor determinative in the proceedings. The letter stated that "[t]he issue of whether Electric Mobility reduced its price after purchasing Chinese pedestal actuators was clearly reflected in [the materials submitted prior to the decision] as disputed between the parties." The letter concludes that the "issue relates only indirectly to the considerations identified by the President as dispositive in his decision."

For these reasons, the matters raised in plaintiff's post-decision submission are insufficient to form the basis upon which this court may compel a reopening of the administrative proceedings.

III. CONCLUSION

For the foregoing reasons, the court concludes that it has subject matter jurisdiction of this case under 28 U.S.C. § 1581(i) and that the President's decision denying import relief to the pedestal actuator industry did not misconstrue the governing statute and did not exceed the authority delegated to the President thereunder. The court finds no basis to overturn that decision on procedural grounds or to order the President or the U.S. Trade Representative to reopen the administrative proceedings. Summary judgment is granted for defendants and will be entered accordingly.

Slip Op. 04–78

HEARTLAND BY-PRODUCTS, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant,

Court No. 03–00307
Before: Barzilay, Judge

[Defendant's Motion to Dismiss granted.]

Decided: July 1, 2004

Serko & Simon (*David Serko, Daniel J. Gluck*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office; Commercial Litigation Branch, Civil Division, Department of Justice (*Aimee Lee*); *Karen P. Binder*, Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, (*Yelena Slepak*) and *Allan Martin*, Associate Chief Counsel, Bureau of Customs and Border Protection, (*Ellen Daly*), of counsel, for Defendant.

OPINION

BARZILAY, JUDGE:

This case involves an ongoing dispute between Heartland By-Products, Inc., a Canadian sugar refiner and importer, and the Bureau of Customs and Border Protection ("Customs" or "the government"). The original substantive issue, which involved Heartland's challenge to a revocation ruling by Customs, has already been decided and settled. The subject of the instant litigation is the proper disposition of entries imported by Heartland in reliance on this court's favorable decision in *Heartland By-Prods., Inc. v. United States*, 23 CIT 754, 74 F. Supp. 2d 1324 (1999) ("*Heartland I*"), during the time between the issuance of that opinion and the issuance of the Federal Circuit's mandate reversing it, *Heartland By-Prods., Inc. v. United States*, 264 F.3d 1126 (Fed. Cir. 2001) ("*Heartland II*"). At

this stage, however, the sole issue before the court is its jurisdiction over the dispute, raised in the government's motion to dismiss. For the reasons stated herein, the government's motion is granted and the case is dismissed for lack of subject matter jurisdiction.

I. Background

In *Heartland I*, Heartland, seeking to import sugar syrup from Canada, challenged a Customs revocation ruling that imposed a significantly higher duty rate than had originally been established in a previous ruling. 74 F. Supp. 2d 1324. In its initial inquiry, Heartland had sought a pre-importation ruling regarding the duty rate applicable to its sugar syrup, and Customs had ruled that a non-Tariff Rate Quota ("TRQ") rate of 0.35¢/liter applied ("the non-TRQ rate"). In reliance upon this ruling, Heartland began to import the sugar syrup. Afterward, in a Revocation of Ruling Letter, Customs indicated that the duty rate would instead be 35.74¢/kg ("the TRQ rate") — an effective duty rate approximately 10,000 percent higher than the non-TRQ rate.

Obtaining jurisdiction under section 1581(h) pre-importation review, Heartland challenged the Revocation Ruling before this court. This court held in favor of Heartland, reversing Customs' imposition of the TRQ rate. *Heartland I*, 74 F. Supp. 2d 1324. Relying on this decision, Heartland continued to import large quantities of the sugar syrup. Customs appealed this court's decision, but did not seek an order staying it pending the appeal. On August 30, 2001, the Court of Appeals for the Federal Circuit held in favor of the government, reversing this court's decision and re-implementing the Revocation Ruling and the TRQ rate. *Heartland II*, 264 F.3d 1126. On August 31, 2001, Heartland stopped importing the sugar syrup.

All along, as Heartland was importing syrup, Customs had been liquidating Heartland's entries, some at the pre-revocation non-TRQ rate and some at the TRQ rate. After the Federal Circuit decision, Customs then began re-liquidating earlier entries at the TRQ rate. Heartland, in a motion for entry of judgment, challenged Customs' liquidation of entries made after this court's *Heartland I* decision and before the Federal Circuit's reversal, arguing that because this court's decision was not stayed, the pre-revocation rate applied to merchandise entered during this interval. The government challenged this court's authority to hear Heartland's claims, arguing that the court no longer had jurisdiction under section 1581(h) because all of Heartland's entries at issue had already been entered, and were thus now considered "actual" entries.

In an extensive opinion this court rejected the government's contention, stating that it retained section 1581(h) jurisdiction over Heartland's entries. Any other interpretation of the statutory provision, this court indicated, would be contrary to the clear intent of the Customs Courts Act of 1980 ("1980 Act") and would in effect render

this court's decisions made pursuant to section 1581(h) unconstitutional as advisory opinions. *See Heartland By-Prods., Inc. v. United States*, 26 C.I.T. ___, 223 F. Supp. 2d 1317, 1333–1334 (2002) ("*Heartland III*"). This court declined to exercise its jurisdiction, however, in order to allow factual ambiguities to become clarified and because the possibility of a better alternative existed — namely, establishing jurisdiction under 28 U.S.C. § 1581(a). *Id.* at 1335. As section 1581(a) requires a valid protest be denied as a prerequisite to obtaining jurisdiction, one of the alternative methods of establishing jurisdiction would have been an agreement between the parties that Heartland would protest the liquidation of a representative entry or entries, and that Customs would then deny the protest(s) and suspend liquidation of Heartland's other entries pending the outcome of Heartland's challenge.[1] After unsuccessful attempts to come to such an agreement, Heartland filed the instant, entirely new, action seeking relief consistent with the court's opinion in *Heartland III* and claiming jurisdiction under section 1581(h), section 1581(i), or alternatively, under the supplemental jurisdiction statute for the federal district courts, 28 U.S.C. § 1367(a). The government argues that the court does not have jurisdiction to hear this case under any of Heartland's pleaded bases, and that the only available avenue would be jurisdiction pursuant to section 1581(a).

II. 28 U.S.C. § 1581(h) Jurisdiction

As stated above, the court found that it retained its original section 1581(h) jurisdiction over the entries at issue in *Heartland III*.[2] The court, however, declined to exercise its jurisdiction, denying Heartland's motion and dismissing the case. *Heartland III*, 223 F. Supp. 2d at 1335–1336. As a result, unfortunately for Heartland, the court formally relinquished jurisdiction over that case. *See, e.g., Lazorko v. Pa. Hosp.*, 237 F.3d 242 (3d Cir. 2000), *cert. denied*, 533 U.S. 930, 150 L. Ed. 2d 719, 121 S. Ct. 2552 (2001) (courts relinquish jurisdiction when dismissing all claims before them). While involving the same parties, entries and underlying dispute as *Heartland III*, the present action is an entirely separate, new cause of action. Therefore, Heartland carries the burden of re-establishing the jurisdiction of this court to survive the government's motion to dismiss. *See Former Employees of Sonoco Prods. Co. v. United States Sec'y of Labor*, 27 CIT ___, 273 F. Supp. 2d 1336, 1338 (2003), *aff'd*, 2004

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[1] At oral argument, government counsel suggested to the court that Heartland could establish section 1581(a) jurisdiction by protesting one entry, after which Customs "would likely" suspend action concerning Heartland's other entries. The court then urged the parties to seek a mutually agreeable resolution to the issues in the present case. *Hr'g Tr.*, 38–40, *Heartland By-Prods., Inc. v. United States*, Ct. No. 99–09–00590 (Jan. 23, 2002).

[2] The same entries are the subject of this action as well.

U.S. App. LEXIS 12071 (Fed. Cir. 2004) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1935)).

During its deliberations, the court requested the parties provide supplemental briefing on the applicability of the doctrines of law of the case and issue preclusion (collateral estoppel) to the present action, of the court's prior statement in *Heartland III*:

> [t]he court finds that 28 U.S.C. § 1581(h) does confer subject matter jurisdiction on this court to consider issues applicable to actual entries, which were the contemplated entries considered when the court first took jurisdiction.

223 F. Supp. 2d at 1320. After careful review, the court finds that neither doctrine is applicable to the facts of the present case, and therefore the government is free to raise the issue of this court's jurisdiction over the present case.

The principle of law of the case indicates that the laws applied in decisions at earlier stages of a litigation become the governing principles at later stages of that same litigation. *Cabot Corp. v. United States*, 12 CIT 664, 670 n.5, 694 F. Supp. 949, 954 n.5 (1998). The instant case is not the same litigation as *Heartland III*, which was dismissed, and therefore, the legal principles established in *Heartland III* cannot be applied here. The doctrine of issue preclusion, on the other hand, applies to two different actions, but only when (1) an issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) the resolution of the issue was essential to a final judgment in the first action; and (4) the party defending against issue preclusion had a full and fair opportunity to litigate the issue in the first action. *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003), *cert. denied*, 157 L. Ed. 2d 693, 124 S. Ct. 805 (2003). Although the court stated in *Heartland III* that it "finds" that section 1581(h) did confer subject matter jurisdiction, it held that the exercise of such jurisdiction would have been inappropriate at that time considering the factual circumstances. Therefore, the government is not collaterally estopped from challenging the jurisdiction of this court to adjudicate Heartland's claim in the instant action.

Having found that it no longer retains jurisdiction pursuant to section 1581(h), as derived from its original exercise of such jurisdiction in *Heartland I*, the court now turns its attention to the issue of whether a new basis exists. Section 1581(h) indicates that:

> [t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, *prior to the importation of the goods involved*, a ruling by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty . . . but only if the party commencing the civil action demonstrates to the court that he

> would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h) (emphasis added). Currently, all of Heartland's entries have been imported, and as the Federal Circuit has settled the long-term outlook of Heartland's sugar syrup importation business, Heartland has no prospective entries. Thus, in this new cause of action, there are no entries that can serve as a basis for maintaining section 1581(h) jurisdiction.

Heartland argues that requiring importers to comply with section 1581(a) and 28 U.S.C. § 2637(a) (exhaustion of administrative remedies), despite having entered the goods in reliance on this court's section 1581(h) judgment in *Heartland I*, would frustrate the Congressional intent underlying section 1581(h). This argument, although attractive, is not compatible with the procedural posture of the case. Pursuant to jurisdiction under section 1581(h), this court in *Heartland I* heard Heartland's claims regarding Customs' treatment of its entries and initially decided the law in Heartland's favor. Because the government did not seek to stay this court's decision pending appeal, it remained in force until the issuance of the Federal Circuit's mandate, reversing the opinion of this court. Thus, if Heartland seeks to challenge Customs' allegedly illegal liquidation or reliquidation of entries at the higher TRQ rate after this court's decision and before the Federal Circuit's mandate, it must do so using section 1581(a), the traditional jurisdictional route. Heartland submits, and the court agrees, that a single entry subject to a denied protest by Customs would be representative of all the "contemplated entries" that Heartland seeks to adjudicate. *See Pl.'s Mem. of Law in Resp. to Def.'s Mot. to Dismiss* ("Heartland Brief") at 17. It is regrettable that such a procedure for establishing jurisdiction could not be worked out by the parties, particularly after the government's seeming acquiescence at oral argument. *See supra* note 1. Nevertheless, because the court denied Heartland's motion for entry of judgment and dismissed its action in *Heartland III*, and because the entries at issue in the present litigation are not prospective entries, Heartland cannot rely on section 1581(h) as a jurisdictional basis for the relief it seeks.

III. 28 U.S.C. § 1581(i) Jurisdiction

According to the well-settled law of this court, jurisdiction under 28 U.S.C. § 1581(i)[3] may not be invoked when jurisdiction under an-

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[3] 28 U.S.C. § 1581(i) states:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil ac-

other subsection of section 1581 is, or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, 98 L. Ed. 2d 859, 108 S. Ct. 773 (1988). The fact that Heartland would be required to pay duties on a protested entry does not alone satisfy the requirement that a remedy under section 1581(a) would be manifestly inadequate. *See Am. Air Parcel Forwarding Co.*, 718 F.2d 1546, 1551 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 937, 80 L. Ed. 2d 458, 104 S. Ct. 1909 (1984); *J.C. Penny Co. v. U.S. Treasury Dept.*, 439 F.2d 63, 68 (2d Cir. 1971), *cert. denied*, 404 U.S. 869, 30 L. Ed. 2d 113, 92 S. Ct. 60 (1971) ("Plaintiffs' allegations of financial impossibility, even if accepted as true, do not place them within the 'adequate remedy' exception. The dispositive consideration in determining whether plaintiffs have an adequate remedy is the nature of the barrier and not its financial height. Any financial barrier is inherent in the system established by Congress, and must have been recognized by Congress . . ."). Heartland claims that forcing it to satisfy the government's $10 million security demand and to deposit the additional $26 million in duties would deprive it of the ability to adjudicate its rights. This claim alone, however, is insufficient to establish jurisdiction under section 1581(i). Heartland has made no factual showing of financial inability to pay, other than referring to the duties as "ruinous," or that paying the duties, for example, would force it into bankruptcy. Thus, on the basis of the information provided to the court, Heartland cannot obtain jurisdiction under section 1581(i).

Furthermore, Heartland's argument that requiring it to pay duties as a condition precedent to invoking jurisdiction under section 1581(a), as required by section 2637(a), would frustrate its right to rely on this court's section 1581(h) judgment is unpersuasive. Heartland had the option to pay the duties owed on a single denied protest and, if required to, seek an injunction against the liquidation of its

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tion commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) ariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

This 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 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

other entries. Treating the single entry as a test case, Heartland could have sought clarification of its rights under this court's section 1581(h) judgment. Heartland did not do so.[4] Therefore, because the remedies provided under section 1581(a) have not been shown to be manifestly inadequate, Heartland is precluded from relying on section 1581(i) as a basis for jurisdiction.

IV. 28 U.S.C. § 1367(a) Supplemental Jurisdiction

Heartland also pleads jurisdiction pursuant to 28 U.S.C. § 1367(a), which allows for supplemental jurisdiction in certain instances. Heartland contends that determination of the effective date of the reversal of the original classification ruling is so related to its original action that it forms part of the same case or controversy as the present action. Therefore, Heartland seems to argue, this court may extend its jurisdiction over the present claim. Section 1367(a) states that:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal Statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution . . .

28 U.S.C. § 1367(a). This argument is inapposite. Even if section 1367 does apply to the Court of International Trade, there exists no statutory basis for the assertion of supplemental jurisdiction in this court. Furthermore, if there were, Heartland's analogy fails since exercising supplemental jurisdiction over a new claim would require an action pending before the court over which it presently has an independent basis for jurisdiction. In the instant case, Heartland's previous claim was dismissed, and there is no pending action before the court to which Heartland's present complaint relates. Therefore, this court cannot take jurisdiction over Heartland's complaint under section 1367(a).

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[4] It is not entirely clear to the court why Heartland did not. The parties disagree as to why their discussions did not lead to a mutually agreed upon method for Heartland to bring its substantive claim before the court through the denied protest/filed summons procedure under 28 U.S.C. § 1581(a). Clearly there were extensive oral and written discussions. The court regrets that they were not successful. Nevertheless, the jurisdictional prerequisites are clear and do not allow the court to assume jurisdiction over this case without their having been met.

V. Conclusion

Because Heartland has failed to establish this court's jurisdiction under any of its pleaded bases, the government's motion to dismiss is hereby granted.

Slip Op. 04–79

Before: Judge Judith M. Barzilay

UNITED STATES, Plaintiff, v. OPTREX AMERICA, INC., Defendant.

Court No. 02–00646

MEMORANDUM OPINION AND ORDER

Before the court is a Motion to Compel Discovery by Plaintiff United States Bureau of Customs and Border Protection[1] ("Customs" or "government") dated February 27, 2004, (see also the companion opinion and order issued in this case on Defendant's Motion to Compel Discovery). This case involves Defendant Optrex's alleged negligent misclassification of imported liquid crystal display ("LCD") panels and modules evidenced by entering incorrect HTSUS item numbers onto entry documents submitted to Customs.

Plaintiff desires: (1) to continue depositions of Ms. Tolbert and Ms. Banas, two Optrex employees, regarding questions previously terminated by Optrex's assertion of attorney-client privilege, and continue with reasonably related follow-up questions; (2) to have Defendant submit full and complete answers to Interrogatories 41–45 and fulfill Production of Documents No. 6; (3) to answer Interrogatories 46 & 47 and amend Admissions 10–15 if the Answers to Interrogatories 46 and 47 so require; and (4) to depose lawyers at Sonnenberg & Anderson. *See Pl.'s Mot. to Compel*, 20–21.

First, the court notes that "[t]he purpose of discovery procedures are (1) to narrow the issues; (2) to obtain evidence for use at trial; and (3) to secure information as to the existence of evidence that may be used at trial." *Wood v. Todd Shipyards*, 45 F.R.D. 363, 364 (S.D. Tex. 1968). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

> Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or

[1] Formerly known as the United States Customs Service.

> unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Advisory Committee's Note to 1983 Amendment to FED. R. CIV. P. 26; *see also* U.S.C.I.T. R. 26 (U.S.C.I.T. discovery rule detailing the scope of discovery at the court). In light of court rules and precedent governing discovery, the court grants the first three motions with exceptions and denies the fourth.

During the depositions of Ms. Tolbert and Ms. Banas, two Optrex employees, Plaintiff sought to uncover advice they received from Sonnenberg & Anderson attorneys about the classification of imported LCD products submitted to Customs at time of entry. *Pl.'s Mot. to Compel*, Att. B 37–38 (Dep. Tr.), Att. F 77–78 (Dep. Tr.). Defendant objected to this line of questioning, asserting that it infringes upon Defendant's attorney-client privilege. *Id.* In its motion, the government petitions the court to override Defendant's claim of privilege and allow the government to continue the depositions.

The privilege between attorney and client has long constituted a pillar of the American judicial system. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) ("The attorney-client privilege protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice."). However, courts have recognized that under certain narrowly tailored circumstances the privilege may be pierced in furtherance of justice.

Defendant asserts that among several experts, it consulted counsel when determining the content of entry documents submitted to the government. Defendant invokes attorney-client privilege to protect this information. However, since this case turns upon a finding of a negligent act or omission as delineated in 19 U.S.C. § 1592, Plaintiff requires access to information from Defendant's counsel that Defendant relied upon when classifying its imports so that Plaintiff may demonstrate such an act or omission occurred, if, indeed, it did.

If Plaintiff proves an act or omission, Defendant then has the burden to prove it did not behave negligently. *See* 19 U.S.C. § 1592(e)(4).[2] If Defendant uses the ostensibly privileged information its counsel provided as a defense, this use of information marks

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[2] 19 U.S.C. § 1592(e) reads:

> Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—
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> . . .

the defense as "affirmative." *See Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (describing various cases in which attorney-client privilege has been waived because "the client has made the decision and taken the affirmative step . . . to place the advice of the attorney in issue."); *Beery v. Thomson Consumer Elecs.*, 218 F.R.D. 599, 604 (S.D. Ohio 2003) ("An attorney-client communication is placed at issue . . . when a party affirmatively uses privileged communications to defend against or attack the opposing party") (quotations omitted) (citations omitted).

An affirmative defense, though, obviates attorney-client privilege with respect to the advice that Defendant received from counsel concerning the entry formulation because, when the content of counsel's advice becomes the object of litigation, attorney-client privilege does not apply to that advice. A " 'party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation,' " *Beery*, 218 F.R.D. at 604 (quoting *Rhone-Poulenc Rorer, Inc.*, 32 F.3d at 863); *see Sax v. Sax*, 136 F.R.D. 542, 543 (D. Mass. 1991), or "when a party affirmatively uses privileged communications to defend against or attack the opposing party." *Beery*, 218 F.R.D. at 604; *see Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). Similarly, in cases where a client's state of mind or knowledge, such as whether the client acted negligently, is at issue, "the attorney-client privilege with respect to attorney-client communications that have bearing on that state of mind or knowledge is impliedly waived." *King-Fisher Co. v. United States*, 58 Fed. Cl. 570, 572 (2003).

Negligence on the part of Optrex would be disproved if Defendant can show that it reasonably relied on its attorney's advice. The government needs the content of this advice to assess the reasonableness of Defendant's reliance upon it. To unwaveringly maintain attorney-client privilege in this circumstance would effectively allow Defendant to use the privilege as a shield and sword to protect itself against any such alleged misdeed and frustrate the purpose of discovery. *See Sellick Equip. Ltd. v. United States*, 18 CIT 352, 354 (1994) (describing the vast scope of the discovery process); *accord Beery*, 218 F.R.D. at 604 (Waiver therefore stops a party from manipulating an essential component of our legal system—the attorney client privilege—so as to release information favorable to it and withhold anything else.) (quotations omitted).

Therefore, the court grants the government's motion to continue depositions of Ms. Tolbert and Ms. Banas. Importantly, Plaintiff may seek only information given by counsel to Defendant about classifica-

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(4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

tion determinations submitted between October 12, 1997, and June 29, 1999—the period when Optrex made the entries at issue in this case. *See Pl.'s Mot. to Compel*, Ex. B.

Interrogatories 41–45 seek information virtually identical to that sought from the depositions: Legal advice about filling out entry documents Defendant may have received from counsel. For the same reasons outlined above, Defendant must submit full and complete Answers to Interrogatories 41–45 and fulfill Production of Documents No. 6 with restrictions. *Id.* at 13–14. Again, the scope of information Plaintiff may obtain from Defendant may not involve advice, information, or events unrelated to the documents for entries submitted before October 12, 1997, or after June 29, 1999. To ensure both parties understand and adhere to the permitted scope of the questions, Interrogatory 41 should be modified to read:

> 41.[3] If your answer to Interrogatory No. 40 is anything other than an unequivocal "no," then state the advice Optrex obtained from Sonnenberg & Anderson regarding the classification of LCD Panels *entered into customs territory of the United States between October 12, 1997, and June 29, 1999*, under HTS tariff heading 8531 or any subheading thereof.

Interrogatory 42 should read:

> 42. State whether Optrex intends to rely upon the advice of Sonnenberg & Anderson regarding the classification of LCD character modules *entered into customs territory of the United States between October 12, 1997, and June 29, 1999*, under HTS tariff heading 8531 or any subheading thereof.

Interrogatory 44 should read:

> 44. State whether Optrex was advised by Sonnenberg & Anderson that certain Customs HQ Rulings were applicable to the classifications of the subject merchandise *entered into customs territory of the United States between October 12, 1997, and June 29, 1999.*

Interrogatories 43 and 45, and document production request No. 6 require no modification.

Interrogatories 46 & 47 and Admissions 10–15 concern the accuracy of Exhibit B, which primarily details information Defendant provided the government about the LCD imports such as the entry date, entry number, invoice part number, part value, entered HTS,

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[3] Italics in the Interrogatories indicates text inserted.

entered duty rate, and duty paid, along with the government's alleged corrections to Defendant's entries. Optrex refuses to answer these Interrogatories and Admissions because it believes Exhibit B contains errors (though it will not identify the errors) and claims it is the government's burden under 19 U.S.C. § 1592(e)(4) to establish the act or omission. However, these posited inaccuracies lie at the heart of Plaintiff's claim. *Def.'s Resp. to Pl.'s Mot. to Compel*, 12. Without an accurate account of classifications Defendant submitted to Plaintiff, the court cannot evaluate the claim.

Defendant previously submitted relevant information in the original entry documents. Providing Plaintiff with information once again to ensure Exhibit B's accuracy will not infringe upon Defendant's ability to mount an effective defense. *Id.* at 14. And while Defendant is correct in its assertion that under 19 U.S.C. § 1592(e)(4) Plaintiff bears the burden of proof "to establish the act or omission constituting the violation," Defendant's production of material it previously submitted will not temper that burden, since the information does not in itself comprise "the material facts which establish the alleged violation," 19 U.S.C. § 1592(b)(1)(A)(iv).

However, Plaintiff suggests some information in Exhibit B did not come from Defendant's submissions to Customs. *Pl.'s Mot. to Compel*, 16. Therefore, when complying with the Interrogatories and document production requested, Defendant need not provide information about errors it detected in Exhibit B that cannot be corrected with recourse to documents or other information Defendant previously submitted to Customs. Consequently, one solution is to modify Interrogatory 47 as below:

> 47. If your answer to Interrogatory No. 46 is any other than an unequivocal "no," list all the errors or produce the document indicating such errors that Optrex alleges are contained in Exhibit B of Plaintiff's First Amended Complaint *to the extent that the list and documents contain information Optrex has previously supplied Customs.*

After answering Interrogatories 46 and 47, Defendant should then amend Admissions 10–15 in accordance with its revised Answers.[4]

These actions and modifications outlined above will allow the government to substantially fulfill its discovery needs and thereby render deposition of Defendant's attorneys redundant. Rule 3.7(a)(3) of THE ABA MODEL RULES OF PROFESSIONAL CONDUCT states that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . . disqualification of the

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[4] With regard to Admission 12, the term "Line Value" does not appear in Ex. B. The court assumes this term refers to column 5, "Part Value."

lawyer would work substantial hardship on the client." Allowing depositions of Defendant's counsel, which could force Defendant to obtain new lawyers, could prove a substantial, unnecessary burden. Plaintiff's motion to depose lawyers at Sonnenberg & Anderson is therefore denied.

For all the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion to Compel Discovery is granted in part and denied in part; it is further

ORDERED that Defendant must answer questions regarding information given by counsel to Defendant about classifications for entries submitted between October 12, 1997, and June 29, 1999; it is further

ORDERED that Defendant allow Plaintiff to continue depositions of Ms. Tolbert and Ms. Banas; it is further

ORDERED that Defendant, within two weeks of this order, submit to Plaintiff full and complete Answers to Interrogatories 41–45 and fulfill Production of Documents No. 6 in accordance with guidelines established above; it is further

ORDERED that Defendant, within two weeks of this order, answer Interrogatories 46 & 47 according to guidelines established above and amend Admissions 10–15 if new Answers so require; it is further

ORDERED that Plaintiff's motion to depose lawyers at Sonnenberg & Anderson is DENIED; and it is further

ORDERED that discovery for Plaintiff be reopened for 60 days from the date of this opinion.

Slip Op. 04–80

Before: Judge Judith M. Barzilay

UNITED STATES, Plaintiff, v. OPTREX AMERICA, INC., Defendant.

Court No. 02–00646

MEMORANDUM OPINION AND ORDER

Before the court is a Motion to Compel Discovery by Defendant Optrex America, Inc., dated February 27, 2004, (see also the companion opinion and order issued in this case on Plaintiff's Motion to Compel Discovery). This case involves Defendant Optrex's alleged negligent misclassification of imported liquid crystal display ("LCD") panels and modules evidenced by entering incorrect HTSUS item numbers onto entry documents submitted to Plaintiff United States

Bureau of Customs and Border Protection[1] ("Customs" or "government").

Defendant desires the court (1) to overrule the government's "General Objections" to Defendant's Interrogatories; (2) to overrule its "Specific Objections," which are delineated in separate answers; (3) to overrule the objections and claims of privilege Plaintiff asserts in its Answers to Defendant's Interrogatories and Requests for Production, as well as Plaintiff's Privilege Log; and (4) to compel the government to provide new, complete Answers to the Interrogatories and to produce and specifically correlate, with their respective Interrogatories and Answers, all documents the government cites in its Answers and documentary production. Defendant also desires to receive an additional 30 days to depose Mr. Jeffrey Reim and any informants identified in the Answers given in response to the requests above. *Def.'s Mot. to Compel*, 41–42. Plaintiff counters with a cross-motion for a Protective Order for information that it considers privileged, as evidenced in a document it calls a Privilege Log. This log lists documents under the headings "Document Number," "Date," "Author," Description," and "Privilege," and purports to assert privileged status for documents relating to Plaintiff's answers to Defendant's Interrogatories as well as information Defendant seeks from Mr. Reim.

First, the court notes that "[t]he purpose of discovery procedures are (1) to narrow the issues; (2) to obtain evidence for use at trial; and (3) to secure information as to the existence of evidence that may be used at trial." *Wood v. Todd Shipyards*, 45 F.R.D. 363, 364 (S.D. Tex. 1968). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

> Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Advisory Committee's Note to 1983 Amendment to FED. R. CIV. P. 26; *see also* U.S.C.I.T. R. 26 (U.S.C.I.T. discovery rule detailing the scope of discovery at the court). In light of court rules and precedent governing discovery, the court partially grants and partially denies Defendant's Motion to Compel Discovery.

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[1] Formerly known as the United States Customs Service.

(1) Before replying to Defendant's Interrogatories, Plaintiff attached an eight-page list of General Objections that recites various grounds for opposing Defendant's Interrogatories without referring to specific Interrogatories or subjects of dispute. *Def.'s Mot. to Compel*, App. B, 1–7. As Defendant correctly asserts, in this court General Objections are not allowed. In other words, in this court "[a]ll grounds for an objection to an interrogatory shall be stated with specificity," U.S.C.I.T. R. 33(b)(4), and "[e]ach interrogatory shall be answered *separately* and *fully* . . ." U.S.C.I.T. R. 33(b)(1) (emphasis added); *see NEC Am., Inc. v. United States*, 10 CIT 323, 325, 636 F. Supp. 476 (1986).

Plaintiff insists it used the General Objections "[f]or convenience." *Pl.'s Opp. to Def.'s Mot. to Compel*, 7. However, such claim is irrelevant because blanket objections are universally considered "improper." *In re Folding Carton Antitrust Litig.*, 83 F.R.D. 260, 264 (N.D. Ill. 1979). Some courts have even construed use of General Objections as a waiver of objections in their entirety. *Id.*; *White v. Beloginis*, 53 F.R.D. 480, 481 (S.D.N.Y. 1971). Thus, the court overrules Plaintiff's General Objections.

(2) Plaintiff's Specific Objections mirror its General Objections, except that they appear in individual answers. Defendant notes that these objections offer "conclusory statements" without explanation. *Def.'s Mot. to Compel*, 9–10. As stated above, a party must support objections with specificity rather than sweeping statements, especially since the objecting party carries the burden of demonstrating the reasonableness of its objections. *See United States v. 58.16 Acres of Land*, 66 F.R.D. 570, 572–73 (E.D. Ill. 1975). "Objections to interrogatories must be specific and be *supported* by a *detailed explanation* as to why interrogatories or a class of interrogatories is objectionable." *Id.* at 572 (emphasis added); *see* U.S.C.I.T. R. 33(b)(4) (All grounds for an objection to an interrogatory shall be stated with specificity . . .); *see also* U.S.C.I.T. R. 26(g)(2) (listing improper grounds for objections). "[M]ere assertion that interrogatories are overly broad, burdensome, oppressive, or irrelevant is not adequate to constitute a successful objection. . . ." *Sellick Equip. Ltd. v. United States*, 18 CIT 352, 354 (1994). Likewise, no answer may "refer to the pleadings, depositions, documents, or other interrogatories." *Id.* at 356 (quoting *NEC Am.*, 10 CIT at 325). In sum, a successful objection offers a recognized reason for objection buttressed by substantiated, detailed proof of the claim.

The government responds by blaming the allegedly "vague" and/or repetitive nature of Defendant's questions for its use of Specific Objections. *Pl.'s Opp. to Def.'s Mot. to Compel*, 8–9. However, U.S.C.I.T. Rules 33(b)(1), (4) and 26(g)(2), and case precedent disallow complaints of vagueness and repetition as objections.

Because Answers to Interrogatories 1, 1(a), 1(b), 1(c), 2, 2(a), 2(b), 2(c), 2(d), 2(f), 3(b), 3(d), 4(b), 5(h), 6(a), 7(a), 8, 9, 9(a), 11, and 12–21 raise unsound, unsubstantiated objections, the court overrules both the answers and the Specific Objections cited within them.[2] The court also orders the government to resubmit answers to Defendant in accordance with this opinion and this court's rules and case law.

(3) Defendant correctly asserts that Plaintiff has not met its burden in asserting privileges to object to Defendant's Interrogatories. *Def.'s Mot. to Compel*, 12. Plaintiff cites the grounds for most of these claims in its Privilege Log. However, information contained in that document is inadequate to support Plaintiff's claims.

With respect to all privilege claims, U.S.C.I.T. Rule 26(b)(5)[3] deems that in general,

> [w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

See also Burns v. Imagine Films Entm't, 164 F.R.D. 589, 593–594 (W.D.N.Y. 1996) (noting that "where Defendants . . . claimed that information requested and material sought were privileged but did not state nor demonstrate the underlying facts or circumstances of the privilege or protection . . . such privilege is denied"); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 306 (S.D.N.Y. 1982).

Plaintiff's invocation of the investigative files privilege to object to Interrogatory 2(e) does not effectively show that "the sources [of the information Defendant seeks] provided [the] information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred," as use of the privilege requires. *R. C. O. Reforesting v. United States*, 42 Fed. Cl. 405, 408 (1998). The government may intend the court to passively accept its claim that the relevant documents "contain sensitive information relating to the Government's investigative techniques and procedures . . ." *Pl.'s Opp. to Def.'s Mot. to Compel*, 16. To grant this privilege claim would have the court and Defendant place their complete trust in Plaintiff's assertions without corroborating proof. Thus,

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[2] *See* Att. A for a specific explanation of the error(s) contained within each overruled Answer.

[3] USCIT Rules closely mirror the Federal Rules of Civil Procedure, and thus cases under FRCP are applicable in our court.

Plaintiff's Answer to Interrogatory 2(e) and its claim of investigatory privilege are overruled.

Plaintiff's assertions of deliberative process privilege in its objections to Interrogatories 7 and 7(a) do not demonstrate, as necessary, that answering the Interrogatories would expose the government's "decision-making processes" rather than merely purely factual information. *Abramson v. United States*, 39 Fed. Cl. 290, 293–95 (1997); *see Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1163 (W.D. Wash. 1986) (Communications are not within the purview of the privilege unless they are both (1) "predecisional" in that they have been generated prior to an agency's adoption of a policy or decision and (2) "deliberative" in that they reflect the give-and-take of a deliberative decision-making process). The government may not deny Defendant access to discoverable information by citing deliberative process privilege unless the information fits into this narrow rubric. Because the court cannot determine if the information for which the government claims this privilege meets these standards, the court overrules Plaintiff's assertion of deliberative process privilege and its Answers to 7 and 7(a).

Further, Plaintiff's Privilege Log does not meet the standards required to assert the privileges claimed because it contains only rudimentary information. *See Pl.'s Opp. to Def.'s Mot. to Compel*, App. E. To meet these standards, the log must

> contain a brief description or summary of the contents of the document, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met as to that document.

Burns, 164 F.R.D. at 594 (quoting FED. R. CIV. P. 26(b)(5), Advisory Committee Notes, 1993 Amendments). The government's log contains only skeletal information and opaque descriptions of the documents' contents. Due to the fragmentary nature of the Privilege Log, neither Defendant nor the court can determine the validity of the privilege claims. Thus, the court overrules Plaintiff's Privilege Log along with the answers that depend upon it for support: 8, 9, 11, 12, and 16–19.

The court orders government counsel to again review the documents contained in Plaintiff's current Privilege Log, mindful of the admonitions concerning the use of privilege as set forth in this opinion. After review, should there be any documents remaining that Plaintiff continues to assert are privileged, Plaintiff will submit a

new Privilege Log to Defendant and this court with information adequate to support its remaining claims.

(4) Defendant seeks to depose Customs Assistant Chief Counsel Jeffrey Reim because it believes he "may have acted outside of the scope of his duties as an attorney when he assumed the roles of special agent during the underlying investigation." *Def.'s Mot. to Compel*, 13. To support this move, Defendant highlights that attorney-client privilege applies only

> (1) [w]here legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [sic] instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Id. at 14 (quoting *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983)).

In response, the government dismisses Defendant's assertion as "provid[ing] no detail concerning the nature of [the] claim" and not "identify[ing] any evidence supporting" it. *Pl.'s Opp. to Def.'s Mot. to Compel*, 18.

While both parties' arguments prove factually correct, they overlook the two crucial issues at stake: Did Mr. Reim provide Plaintiff with discoverable information, and if so, does this information fall within attorney-client privilege? Currently, the court cannot determine the nature of the information Mr. Reim may have provided the government, let alone whether it deserves privileged status. The court will hear counsels' arguments on this issue as described below.

Plaintiff's Privilege Log discloses too little information for the court to judge the merits on this issue as well. *See supra* part (3). Therefore, the court orders government's counsel to review again the documents in the Privilege Log, mindful of the court's admonitions concerning the use of privilege as set out in the opinion. Should Plaintiff continue to assert privilege with regard to any remaining documents concerning Mr. Reim's deposition or attorney-client privilege, those documents must be submitted to the court for the court's *in camera* review.

(5) Because most of the government's Answers to Defendant's Interrogatories should be resubmitted to Defendant in accordance with court rules, the government should also reformulate its Answers that depend upon the overruled ones. The Answers requiring revision include 1(c), 2(c), 3(e), 8(a), 9(a), 10, and 11(a). Plaintiff should also produce and specifically correlate with its respective Interrogatories and Answers all documents cited in its answers and documentary production for Defendant.

At oral argument, the court would also have government's counsel explain why government's counsel should not be sanctioned for delivering to Defendant's counsel thirteen boxes of unorganized documents (later reduced to three) during discovery and for providing answers to Defendant's Interrogatories that persistently violate court rules and case law. *See* U.S.C.I.T. R. 37; *Burns*, 164 F.R.D. at 600–601; *In re Folding Carton Antitrust Litig.*, 83 F.R.D. at 264; *White*, 53 F.R.D. at 481.

For all the foregoing reasons, it is hereby

ORDERED that Plaintiff's Cross-Motion for a Protective Order is DENIED; it is further

ORDERED that Plaintiff's General Objections to Defendant's Interrogatories are overruled; it is further

ORDERED that Plaintiff's Specific Objections in and Answers to Interrogatories 1, 1(a), 1(b), 1(c), 2, 2(a), 2(b), 2(c), 2(d), 2(f), 3(b), 3(d), 4(b), 5(h), 6(a), 7(a), 8, 9, 9(a), 11, and 12–21 are overruled (see App. A); it is further

ORDERED that Plaintiff's Privilege Log and all of Plaintiff's claims of privilege are overruled, as are Plaintiff's Answers to Interrogatories 2(e), 7, 7(a), 8, 9, 11, 12, and 16–19, which rely upon these privilege claims (*see* App. A); it is further

ORDERED that Answers to Interrogatories 1(c), 2(c), 3(e), 8(a), 9(a), 10, and 11(a) are overruled because their validity depends on already overruled Answers (see App. A); it is further

ORDERED that for all Answers overruled for whatever reason, Plaintiff must provide Defendant with new Answers in accordance with court rules within 30 days; it is further

ORDERED that discovery for Defendant be reopened for 60 days after this order; it is further

ORDERED that if Plaintiff intends to maintain its claims of privileges with respect to any information, it must present a new privilege log to Defendant and the court within one week of this order; if the court again finds the log deficient, it may waive use of all privileges invoked therein (*see* U.S.C.I.T. R. 37; *Burns*, 164 F.R.D. at 600–601; *In re Folding Carton Antitrust Litig.*, 83 F.R.D. at 264; *White*, 53 F.R.D. at 481); it is further

ORDERED that within one week of this order Plaintiff turn over to the court all documents for which Plaintiff plans to claim privilege related to the deposition of Mr. Reim for *in camera* review; it is further

ORDERED that on July 14, 2004, the court will hear oral arguments specifically and only in reference to Defendant's Motion to Depose Mr. Reim and to allow Plaintiff's counsel to explain why the court should not sanction the government for its discovery actions which violate court rules and case law teachings. If counsel so desire, the court will hold oral argument via telephone. Counsel are to consult and inform chambers within one week of the date of this order.

Appendix A

Interrogatory Number	Reason(s) for Overruling*
1	RD
1(a)	RD
1(b)	RD
1(c)	RD, OA
2	RD
2(a)	RD
2(b)	RD
2(c)	RD, OA
2(d)	RD
2(e)	B (*see supra* part (3))
2(f)	RD
3(b)	RD
3(d)	RD
3(e)	OA
4(b)	RD
5(h)	R, V, AH
6(a)	RD
7	B (*see supra* part (3))
7(a)	V, B (*see supra* part (3))
8	AH, B, PL
8(a)	OA
9	R, AH, PL
9(a)	R, AH, OA
10	OA
11	R, PL, AH
11(a)	OA
12	RD, PL, AH
13	RD
14	RD
15	I
16	R, PL, AH

Interrogatory Number	Reason(s) for Overruling*
17	R, RD, PL, AH
18	RD, R, PL, AH
19	RD, R, PL, AH
20	I
21	RD

***Explanation of the Abbreviations for Overruling**

R - Answer inappropriately objects to Interrogatory for being repetitive.

V - Answer inappropriately objects to Interrogatory for being vague.

RD - Answer inappropriately refers to documents not in Answer.

I - Answer incomplete.

AH- Answer inappropriately claims Defendant has requested documents in its possession.

B- Burden of proof for privilege invoked in Answer not met.

PL- Answer objects to Interrogatory based on overruled Privilege Log.

OA- Answer depends on another overruled Answer.