Decisions of the United States Court of International Trade

(Slip Op. 02–29)

OCEAN HARVEST WHOLESALE, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY, AND BOB ODOM, COMMISSIONER, DEFENDANT-INTERVENORS

Court No. 00–05–00231

Domestic Importer ("Plaintiff") brought action challenging United States Department of Commerce's ("Commerce") findings on review of antidumping duty order covering crawfish tail meat from the People's Republic of China exported by Yancheng Foreign Trade Corp. and Nantong Delu Aquatic Food Co., Ltd. ("exporters"). Plaintiff moved, pursuant to USCIT R. 56.2, for judgment upon the agency record arguing: (1) Commerce's use of facts available was improper as it had not provided exporters with adequate opportunity to respond to deficiencies in antidumping questionnaire responses; (2) Commerce impermissibly applied adverse inferences as to exporters because record did not support finding that they had not acted to the best of their abilities; and (3) Commerce relied on uncorroborated information in using adverse inferences. The United States, on behalf of Commerce, argued actions were supported by substantial evidence on the record and otherwise in accordance with law in that Commerce: (1) permissibly used facts available as exporters had adequate opportunities to remedy deficiencies in questionnaire responses; (2) properly applied adverse inferences as exporters had not acted to best of abilities inasmuch as they had not complied with Commerce's repeated requests for information; and (3) use of information for determining adverse inferences had been previously corroborated. United States Court of International Trade, Eaton, J. held: (1) use of country-wide antidumping margin as to Yancheng Foreign Trade Corp. was not in accordance with law as Commerce did not provide adequate opportunity to rebut nonmarket economy presumption of state control; and (2) use of country-wide margin as to Nantong Delu Aquatic Food Co., Ltd., was supported by record and in accordance with law as company had adequate notice of consequences of failing to rebut nonmarket economy presumption of state control and failed to do so.

[Antidumping determination remanded to Commerce.]

(Dated March 20, 2002)

deKieffer & Horgan (J. Kevin Horgan, Peter L Sultan), for Plaintiff.

Robert D. McCallum, Jr., Deputy Assistant Attorney General; *David M. Cohen,* Director, United States Department of Justice; *Velta A. Melnbrencis,* Assistant Director, United States Department of Justice, Civil Division, Commercial Litigation Branch; *Arthur D. Sidney,* Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Adduci, Mastriani & Schaumberg, L.L.P., (James Taylor, Jr.); John C. Steinberger, of Counsel, for Defendant-Intervenor.

OPINION AND ORDER

EATON, *Judge:* This matter is before the court on the motion of Plaintiff Ocean Harvest Wholesale Inc.[1] ("Ocean Harvest") for judgment upon the agency record pursuant to USCIT R. 56.2. Ocean Harvest challenges aspects of the first administrative review of the antidumping duty order covering certain imports of freshwater crawfish tail meat from the People's Republic of China ("PRC") for the period of March 26, 1997, through August 31, 1998. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994) and 19 U.S.C. § 1516a(a)(2)(i)(I) (1994). Where a party challenges the findings of an antidumping administrative review, 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). For the reasons set forth below, the court remands this matter to Commerce with instructions to conduct further proceedings in conformity with this opinion.

BACKGROUND

A. Antidumping Duty Determination

On September 20, 1996, the Crawfish Processors Alliance ("Petitioner"), on behalf of the domestic industry, filed a petition with the United States Department of Commerce ("Commerce") alleging that imports of freshwater crawfish tail meat from the PRC were being sold, or were likely to be sold, in the United States at less than fair value. *See Freshwater Crawfish Tail Meat From the P.R.C.; Initiation of Antidumping Investigation,* 61 Fed. Reg. 54,154 (Oct. 17, 1996). Following receipt of the petition, Commerce initiated an investigation and sent antidumping questionnaires to various PRC crawfish tail meat exporters and producers. *See Notice of Prelim. Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the P.R.C.,* 62 Fed. Reg. 14,392, 14,393 (Mar. 26, 1997) *("Investigation Prelim. Determination").* Fully responsive questionnaires were received from numerous companies,[2] including Yancheng Foreign Trade Corp. ("YFTC") and Nantong Delu Aquatic Food Co., Ltd. ("Nantong Delu") (jointly "Companies").[3] *Id.* Because of the number of respondents, Commerce limited its investigation to the six largest[4] and, from the data supplied by the respondents, identified YFTC as one of these six. *Id.* In addition, as it had done previously, Commerce concluded that the PRC was a nonmarket economy country and, thus, exporters wishing to receive a company-specific

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[1] As domestic importer of the subject merchandise, Ocean Harvest is an "interested party" within the meaning of 19 U.S.C. § 1516a(f)(3) and 19 U.S.C. § 1677(9) (1994).

[2] The following companies also timely submitted questionnaire responses: China Everbright Trading Co., Binzhou Prefecture Foodstuffs Imp. & Exp. Corp., Yancheng Fengbao Aquatic Food Co., Ltd., Huaiyin Foreign Trade Corp., Jiangsu Cereals, Oils & Foodstuffs Imp. & Exp. Corp., Jiangsu Light Indus. Prods. Imp. & Exp. (Group) Yangzhou Co., Lianyungang Yupeng, Jiangsu Overseas Group Corp., Anhui Cereals, Oils and Foodstuffs Imp. & Exp. Corp., Qidong Baolu Aquatic Prods. Co., Ltd., Shandong Foodstuffs Imp. & Exp. parte. Corp., Huaiyin Ningtai Fisheries Co., Ltd., and Yancheng Baolong Aquatic Foods Co., Ltd. *See Investigation Prelim. Determination,* 62 Fed. Reg. at 14,393.

[3] These two exporters supplied Ocean Harvest with freshwater crawfish tail meat during the period of review. *(See* Pl.'s Mem. Supp. Mot. J. Agency R. at 3.)

[4] *See* 19 U.S.C. § 1677f–1(c)(2)(B) (1994).

antidumping duty margin were required to demonstrate independence from state control. *Id*. at 14,394. In the questionnaire responses submitted to Commerce, all respondents indicated that they were applying for separate company-specific margins. *Id.*

In August of 1997, Commerce completed its investigation and established antidumping duty margins for individual exporters and for the PRC as a whole. Since YFTC had been selected for review and demonstrated the requisite independence from state control, its company-specific antidumping duty margin was set at 108.05 percent.[5] *See Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the P.R.C.,* 62 Fed. Reg. 41,347, 41,358 (Aug. 1, 1997) *("Investigation Final Determination").* Nantong Delu, although not one of the six exporters selected for review, was found to be fully responsive and to have demonstrated its independence from governmental control and, thus, received a "weighted-average" antidumping margin of 122.92 percent.[6] *Id.* The "country-wide" PRC margin was set at 201.63 percent. *Id.*

B. Antidumping Duty Administrative Review

In 1998 Petitioner sought administrative review of the antidumping order for the period of March 26, 1997, through August 31, 1998. This petition named YFTC and Nantong Delu as among those exporters to be reviewed.[7] *Notice of Prelim. Results of Antidumping Duty Admin. Review and New Shipper Reviews, Partial Rescission of the Antidumping Duty Admin. Review, and Rescission of the New Shipper Review for Yancheng Baolong Biochem. Prods., Co. Ltd.: Freshwater Crawfish Tail Meat From the P.R.C.,* 64 Fed. Reg. 55,236, 55,237 (Oct. 12, 1999) *("Prelim. Results").* On November 17, 1998, Commerce sent questionnaires[8] and instructions for completing them to the Companies. (Letters from Commerce to Companies of 11/17/98, Pub. R. Doc. 8 at 3, 17.) Among other things, Commerce solicited information regarding each Company's management, relationship to national and local governments, and other questions about its structure and control.

1. YFTC's Questionnaire Responses

On December 16, 1998, Commerce received YFTC's section A response. *(See* letter from Commerce to YFTC of 1/11/99, Pub. R. Doc. 221 at 1 (referencing receipt of section A response).) In its cover letter accompanying this section, YFTC stated that several of the included exhibits contained proprietary information. (Letter from YFTC to Commerce of 12/16/98 accompanying section A response, Conf. R. Doc. 42, Attach. 1.) None of the exhibits were marked as proprietary, howev-

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[5] *See* 19 U.S.C. § 1677f–1(c)(1).

[6] Commerce stated that this margin was "based on the calculated margins of the four selected respondents that fully cooperated * * *." *Investigation Final Determination,* 62 Fed. Reg. at 41,350.

[7] *See* 19 C.F.R. § 351.202(b)(7)(A) (1998).

[8] The questionnaires consisted of several sections. Those relevant to this discussion are: A (general information); C (United States market information); and D (home market information for merchandise sold in the United States).

er, or contained bracketed data in accordance with regulations.[9] On January 5, 1999, Commerce received YFTC's section C and D responses. *(See* letter from Commerce to YFTC of 2/11/99, Pub. R. Doc. 222 at 1 (referencing receipt of section C and D responses).[10]) YFTC's section C response was accompanied by a letter that stated "[t]his document contains Proprietary Information On Exibits: C1." (Letter from YFTC to Commerce of 1/5/99 accompanying section C response, Conf. R. Doc. 42., Attach. 2 at 1 (text as in original).) As with YFTC's section A response, though, this exhibit neither was marked as being proprietary nor contained bracketed data. *(See* YFTC section C response, Conf. R. Doc. 42, Attach. 2, Ex. C1.) YFTC's section D response was accompanied by a letter which stated that certain exhibits attached thereto contained proprietary information (letter from YFTC to Commerce of 1/5/99 accompanying section D response, Conf. R. Doc. 42., Attach. 3 at 1), however, some of these exhibits were labeled as "public" documents and none contained bracketed sales data.[11] (YFTC section D response, Conf. R. Doc. 42, Attach. 3, Exs. D1, D2, D3.) Finally, YFTC did not file the requisite number of copies of its section C and D responses with Commerce, or serve interested parties with copies of the responses in accordance with regulations. *(See* letter from Commerce to YFTC of 2/11/99, Pub. R. Doc. 222.)

By letter dated January 11, 1999, Commerce informed YFTC that, while its section A response was deficient—in that it did not meet the filing and service requirements required by regulations (fax from Commerce to YFTC of 1/11/99, Pub. R. Doc. 221 at 1)—it would, nonetheless, be accepted. *(Id.)* Commerce also advised YFTC that it "remain[ed] responsible for serving this request[12] to all parties on the service list. In addition, any future submissions not filed in full accordance with the Department's regulations [would] not be accepted." *(Id.)* The letter included a copy of the applicable regulations, a mailing address for submissions, a reminder that all submissions should be properly marked, information about the number of copies to be submitted, information as to the treatment and release of business proprietary information, and a list of interested parties required to be served with non-confidential versions of the completed submissions. *(Id.* at 1–2.) Finally, the names and phone numbers of agency contact personnel were included should YFTC have any questions. *(Id.* at 2.)

On January 12, 1999, YFTC replied to Commerce's January 11 letter:

> Many thanks for your kind fax dated Jan 11, 1999, which guid us how to finish our submission.

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[9] *See generally Antidumping and Countervailing Duty Proceedings: Admin. Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order,* 63 Fed. Reg. 24,391, 24,401–03 (May 4, 1998), *effective* June 3, 1998 (codified at 19 C.F.R. § 351.304) (setting forth procedure for filing proprietary information).

[10] The certified record index fixes the date of this letter's sending as February 11, 1999.

[11] YFTC's "section D response" was comprised of two separate responses covering two different suppliers. The response for the first supplier, Yancheng Fubao Aquatic Food Co., Ltd., covered merchandise supplied to YFTC in 1997. The response for the second supplier, Nantong Delu, covered merchandise supplied to YFTC in 1998. *(See* YFTC questionnaire, Conf. R. Doc. 42, Attachs. 3, 4.)

[12] Probably "response."

> First, we thank you for you had accepted out Response A, for we didn't know very clear how to finish a ggod, complete submission, so if you need more information form us, we will try our best to supply you as sson as we can. We have mailed the response for section C & D to the address what we used as Section A, we will copies of them to whom listed in your attached service list in the next a few days.

(fax from YFTC to Commerce of 1/12/99, Pub. R. Doc. 28 (text as in original).) Notwithstanding its previous correspondence, by letter dated February 11, 1999, Commerce informed YFTC that its entire questionnaire—comprised of sections A, C, and D—was being returned. The letter stated that, in addition to the types of service and filing deficiencies described in Commerce's January 11 letter, the questionnaire responses were not in conformity with regulations concerning the submission of proprietary information. (Letter from Commerce to YFTC of 2/11/99, Pub. R. Doc. 222 at 1.) Commerce explained that, while YFTC had indicated in the letters accompanying the submissions that the responses contained proprietary information, the responses themselves were neither marked as such nor was any proprietary information identified within them. *(Id.)* Commerce invited YFTC to resubmit its responses and provided the applicable regulations for guidance. *(Id.* at 1–2.) This letter, however, contained two separate submission deadline dates. First, in paragraph four, the letter stated:

> We are returning your submissions under Section 351.304(d) of the Department's Regulations which states that the Secretary of Commerce (Secretary) will return a submission that does not meet the requirements of this section with a written explanation. Within two business days after receiving the Secretary's explanation, the submitting person may correct the problems and resubmit the information. Pursuant to section 351.304 (d) (iv), if you do not take the above action, the Secretary will not consider the returned submission.[13]

(Id. at 1–2.) Then, in paragraph five, the letter stated:

> The properly marked and bracketed proprietary and public versions of all your previously tendered submissions (Sections A, C, and D responses) must be submitted and properly served according to the Department's regulations. * * * Please note that if your submissions are not submitted in the proper format and properly served by the close of business (COB) February 26, 1999, the Department may base its determination on adverse facts available in accordance with section 351.308 of the Department's regulations and Section 776 of the Tariff Act of 1930 as amended.

(Id. at 2.) Again, as with its previous letter, Commerce included the names and phone numbers of agency personnel who could assist YFTC with its submissions or questions. *(Id.)* Commerce received no response to this letter. *(Issues and Decision Memo for the Admin. Review of the Antidumping Duty Order on Freshwater Crawfish Tail Meat from the*

[13] In other words, Commerce would, pursuant to 19 U.S.C. § 1677e(a), base its determination on facts available.

P.R.C.—Mar. 26, 1997 through Aug. 31, 1998, Pub. R. Doc. 214 at 11 *("Decision Memo").)*

Still later, by letter dated February 17, 1999, nine days before the submission deadline in paragraph five of its February 11 letter, Commerce informed YFTC that none of its submissions—including its section A response of December 16 and its section C and D responses of January 5—would be included in the administrative record for consideration in the antidumping review. (Letter from Commerce to YFTC of 2/17/99, Pub. R. Doc. 226 at 1.) In this letter Commerce stated:

> [W]e informed you that your responses to sections A, C, and D of [Commerce's] * * * questionnaire * * * did not comply with Sections 351.303 and 351.304 of the Department's Regulations governing the treatment Business Proprietary Information (BPI). For this reason, we have determined not to accept the submissions into the record of this administrative review. Enclosed are copies of your submission.
>
> A copy of the rejected submissions is being placed on the record solely for purposes of judicial review as to whether the Department properly rejected the submissions. The Department will not consider the rejected submissions in the review of crawfish tail meat from the PRC.[14]

(Id.) In apparent contradiction, however, Commerce further stated:

> Please note that if your responses are not submitted in the proper format and properly served pursuant to Sections 351.303 (b), (c), (d), (e), (f), and (g), of the Department's Regulations by the close of business February 26, 1999, the Department may base its determination on adverse facts available in accordance with section 351.308 of the Department's regulations and Section 776 of the Tariff Act of 1930 as amended.

(Id.) Commerce received no reply to this letter, and YFTC never resubmitted its questionnaire responses. *(Decision Memo* at 11; Pl.'s Mem. Supp. Mot. J. Agency R. at 7.)

2. Nantong Delu's Questionnaire Responses

On December 25, 1998, Nantong Delu faxed its section A response to Commerce. (Letter from Commerce to Nantong Delu of 1/11/99, Pub. R. Doc. 220 at 1 (referencing receipt of section A response).) On January 11, 1999, Commerce notified Nantong Delu that its section A submission was deficient because it had not been properly filed or served on all interested parties. *(Id.)* Nonetheless, as with YFTC's section A response, Commerce informed Nantong Delu that its response would be accepted, but that it "remain[ed] responsible for serving this request[15] to all parties on the service list. In addition, any future submissions not filed in full accordance with the Department's regulations will not be accepted." *(Id.)* Commerce included a copy of the relevant regulations, the

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14 This language apparently meant that Commerce would not base its determination on any further information submitted but would, instead, use facts available.

15 Probably "response."

mailing address to which submissions should be sent, a reminder that all submissions should be properly marked, information about the number of copies to be submitted and the treatment and release of business proprietary information, and a list of the interested parties required to be served with non-confidential versions of the completed submissions. *(Id.* at 1–4.) Finally, the names and phone numbers of the appropriate contact personnel were included should Nantong Delu have any questions. *(Id.* at 2.)

On January 11, 1999, Nantong Delu filed responses to sections C and D. These were accompanied by a letter that stated:

> All information, including response for Section A, C, D, for the above mentioned investigation No., are finished and presented by ourselves, that's Nantong Delu Aquatic Food Co., Ltd. We didn't appoint any attorneys on this case, but the all information we have presented has been read and certified by our company official, and proved to be the best of our knowledge.
>
> We will be responsible for all information we presented, and if you have any questions on this submission, please don't hesitate to contact us.

(Letter from Nantong Delu to Commerce of 1/11/99, Conf. R. Doc. 41, Attach. 2 at 1 (text as in original).) Neither section was marked to identify it as either a public or proprietary submission. *(See generally id.* at Attachs. 2, 3.)

By letter dated April 5, 1999, Commerce informed Nantong Delu it was "in receipt of your January 11 responses to sections A, C, and D of the Department of Commerce's * * * questionnaire" and its "February 2 reorganized section A response, but have not received the reorganized response for sections C and D you referred to in your February 2 letter." *(Id.* (referencing receipt of Nantong Delu's 2/2/99, letter).) Further, by this letter, Commerce informed Nantong Delu that its entire submission—comprised of reorganized section A and the original sections C and D—was being returned as none of the sections conformed to regulations concerning the submission of business proprietary information. *(Id.)* Commerce also explained that it was returning Nantong Delu's reorganized section A response due to uncertainty as to the proprietary status of the document. *(Id.* ("[I]n your reorganized section A response * * * you advise that the submission is a 'Public Version.' Please clarify whether this is a public document or a public version of a proprietary document.").) Commerce further explained that it was returning Nantong Delu's section C and D responses since they had "not been marked as either public or proprietary."[16] *(Id.)* However, this deficiency letter, like the one sent to YFTC, contained ambiguous information by providing for two submission deadline dates: the first being that all submissions were to be made within two business days of receipt of the letter *(id.* at 1); and the second being a deadline of April 20, 1999. *(Id.* at 2.) As with the January 11, 1999, letter to Nantong Delu, this communication

[16] *See* 19 C.F.R. § 351.303(d)(2)(v)–(vi).

included the names and phone numbers of appropriate contact personnel. *(Id.* at 1.)

Unlike YFTC, though, Nantong Delu replied to this communication by letter dated April 15, 1999, in which it requested an extension of time to respond to various issues raised in Commerce's April 5, 1999, letter. *(See* letter from Commerce to Nantong Delu of 4/19/99, Pub. R. Doc. 227 at 1.[17]) Commerce granted Nantong Delu's request, and set a final filing date of April 27, 1999. *(Id.)* This time, however, Commerce's instructions were unambiguous and to the point:

> [I]f all of your submissions are not submitted in the proper format and properly served by the close of business on **April 27, 1999,** the Department may be required to base its determination on facts otherwise available and use information that is adverse to your interests in accordance with Section 351.308 of the Department's regulations and * * * 19 U.S.C. § 1677e.

(Id.) Commerce did not receive a reply to this letter or any completed questionnaire responses. *(Decision Memo,* Pub. R. Doc. 214 at 11; Pl.'s Mem. Supp. Mot. J. Agency R. at 8 (emphasis in original).)

C. Administrative Review Final Results

At the conclusion of its investigation, Commerce determined that the use of facts available and adverse inferences were warranted as to both Companies. As to facts available Commerce explained:

> Two firms, [YFTC] and Nantong Delu, failed to file their questionnaire responses in the proper manner and to serve responses on the other interested parties in this review, as required by sections 351.303 and 351.304 of the Department's regulations. The Department afforded [YFTC] and Nantong Delu numerous opportunities to remedy these deficiencies. Neither company complied with the applicable regulations. Consequently, the information was returned to [YFTC] on February 19, 1999,[18] and to Nantong Delu on April 5, 1999. Because [YFTC] and Nantong Delu failed to respond to our requests in the form and manner requested, we determine that they did not cooperate to the best of their ability with our requests for information. Therefore, pursuant to [19 U.S.C. § 1677e(a)(2)(B)], the use of [facts available] is required for [YFTC] and Nantong Delu.

Prelim. Results, 64 Fed. Reg. at 55,239; *see also (Decision Memo,* Pub. R. Doc. 214 at 7 ("In the preliminary results of review, the Department applied [facts available] for both of these firms in accordance with [19 U.S.C. § 1677e(1)(2)(B)].")); *Freshwater Crawfish Tail Meat From the P.R.C.: Final Results of Admin. Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review,* 65 Fed. Reg. 20,948, 20,949 (Apr. 19, 2000) (incorporating by reference *Decision*

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[17] Commerce sent identical copies of this letter to Nantong Delu by fax and Federal Express. (Letter from Commerce to Nantong Delu of 4/19/99, Pub. R. Doc. 227 at 1.)

[18] According to the record this letter was dated February 17, 1999. *(See* Letter from Commerce to YFTC of 2/17/99, Pub. R. Doc. 226.)

Memo reasoning) *("Final Results").* Commerce then determined the use of adverse inferences was warranted as to the Companies:

> While [YFTC and Nantong Delu] received separate rates in the original investigation, it is the Department's policy that separate-rates questionnaire responses must be evaluated each time a respondent makes a separate rate claim, regardless of any separate rate the respondent received in the past. However, for companies for which no questionnaire response is on the record, or which refuse verification, we are unable to evaluate whether a separate rate would be appropriate. In the instant administrative review, these companies failed to provide complete and accurate responses which could be used in the determination of separate rates. Therefore, consistent with Department practice, we are treating these companies, together with all other PRC companies that have not established that they are entitled to separate rates, as a single enterprise subject to government control. Thus, we have determined the rate applied to this single enterprise, the PRC-wide rate, based on adverse [facts available], in accordance with section [19 U.S.C. § 1677(b)].

Prelim. Results, 64 Fed. Reg. at 55,239 (citation omitted); *see also (Decision Memo,* Pub. R. Doc. 214 at 7 ("For these final results, we continue to find that these exporters are subject to the PRC-wide rate * * *.")); *Final Results,* 65 Fed. Reg. 20,949 (incorporating by reference *Decision Memo* reasoning).

DISCUSSION

Ocean Harvest raises three arguments in support of its motion. First, it claims that Commerce improperly resorted to the use of facts available because neither of the Companies was given a meaningful opportunity to remedy deficiencies in its submissions. Second, it argues that even if the use of facts available were warranted, the use of adverse inferences was not, because the record does not support the Government's conclusion that the Companies did not act to the best of their abilities. Finally, Ocean Harvest argues that Commerce's reliance on the underlying information used for its adverse inferences determination was not in accordance with law since that information had not been properly corroborated.

The United States ("Government") on behalf of Commerce, asserts that Commerce properly used facts available because both Companies failed to provide information by the deadlines for submission, and both had adequate opportunities to remedy any deficiencies in their submissions. Next, the Government argues that Commerce properly used inferences adverse to the interests of the Companies in assigning to them the PRC-wide antidumping margin of 201.63 percent because: (1) each failed to act to the best of its ability by not complying with Commerce's repeated requests for information; and (2) Commerce has "broad discretion in selecting an inference that is adverse to the interests of a party * * *." (Def.'s Mem. Opp'n to Mot. J. Agency R. at 21.) Finally, the Gov-

ernment contends that the information underlying its adverse inference determination had been previously corroborated.

I. Nonmarket Economy Presumption of State Control

Where Commerce has determined that a country has a nonmarket economy,[19] all commercial entities within that country are presumed to be subject to central governmental control. *Sigma Corp. v. United States,* 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) ("[I]t was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control. * * * Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control." (citations omitted)); *see also Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States,* 25 CIT ____, Slip Op. 01–120 at 50 (Sept. 28, 2001) (citing *Manganese Metal from the P.R.C.; Final Results and Partial Rescission of Antidumping Duty Admin. Review,* 63 Fed. Reg. 12,440, 12,441 (Mar. 13, 1998)). A nonmarket economy exporter rebuts this presumption when it can "'affirmatively demonstrate' its entitlement to a separate, company-specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports.'" *Sigma,* 117 F.3d at 1405 (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States,* 16 CIT 931, 935, 806 F. Supp. 1008, 1013–14 (1992)); *Fujian Mach.,* 25 CIT at ____, Slip Op. 01–120 at 50 (citing *Final Determination of Sales at Less Than Fair Value: Sparklers From the PRC,* 56 Fed. Reg. 20,588, 20,589 (May 6, 1991)). In the event that a company fails to rebut the presumption of state control and, hence, establish its entitlement to a company-specific margin, Commerce may then assign it a "country-wide" margin. *See Transcom, Inc. v. United States,* 182 F.3d 876, 882 (Fed. Cir. 1999) ("In the *Iron Construction Castings* case, Commerce applied a presumption of state government control to nonmarket economy countries and determined that if an exporter failed to demonstrate its independence from the state-controlled entity, a single, country-wide rate would be applied to the exporter's goods." (citing *Iron Construction Castings From the P.R.C.; Final Results of Antidumping Duty Admin. Review,* 56 Fed. Reg. 2742 (Jan. 24, 1991))); *see also Sigma,* 117 F.3d at 1411 (stating Commerce has a "long-standing practice of assigning to respondents who fail to cooperate with Commerce's investigation the highest margin calculated for any party in the less-than-fair-value investigation or in any administrative review." (citing *D&L Supply v. United States,* 113 F.3d 1220, 1222 (Fed. Cir. 1997))). Where a PRC exporter fails to (1) provide information to rebut the nonmarket economy presumption of state control, or (2) otherwise respond to Commerce's requests for information,

[19] A "nonmarket economy" 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)(a). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(c)(i). Commerce's designation of the PRC as a nonmarket economy country is not disputed.

Commerce may apply the country-wide margin to such exporter's merchandise. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the P.R.C.; Final Results of 1999–2000 Admin. Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part,* 66 Fed. Reg. 57,420, 57,422 (Nov. 15, 2001); *Persulfates From the P.R.C.: Final Results of Antidumping Duty Admin. Review,* 66 Fed. Reg. 42,628, 42,628–29 (Aug. 14, 2001); s*ee also Union Camp Corp. v. United States,* 22 CIT 267, 277, 8 F. Supp. 2d 842, 851 (1998). However, where Commerce provides notice that is so confusing or ambiguous that it cannot be said to have provided a respondent with an adequate opportunity to rebut the nonmarket economy presumption of state control, any determination based on that respondent's failure to rebut the presumption cannot be said to be in accordance with law. *See Ta Chen Stainless Steel Pipe, Ltd. v. United States,* 23 CIT 804, 819 (1999) ("The failure of Commerce to provide respondents with sufficient notice can render the decision 'unsupported by substantial evidence and otherwise contrary to law.'" (citing *Usinor Sacilor v. United States,* 19 CIT 711, 745, 893 F. Supp. 1112, 1141–42 (1995), *rev'd on other grounds Usinor Sacilor v. United States,* 215 F.3d 1350 (Fed. Cir. 1999)).

A. YFTC

Here, the information Commerce provided to YFTC, concerning the submission of remedial responses that might have enabled it to rebut the nonmarket economy presumption of state control, was so ambiguous as to be inadequate. First, Commerce sent YFTC a deficiency letter stating that, although its section A response did not conform to regulations it would, nonetheless, be accepted. Next, thirty days later, Commerce sent YFTC a second deficiency letter stating that none of its questionnaire responses—including section A—conformed to regulations and that they were being returned. This letter then set two submission dates, the second being February 26, 1999. Then, on February 17, 1999, Commerce sent YFTC a third letter that stated in one paragraph that none of its submissions would be included in the record and, in a later paragraph, that its responses were due by February 26, 1999. As a result, notice was so ambiguous that it was not adequate, and the Government presents no convincing reason for Commerce's conduct. Moreover, it is evident from the record that Commerce never sought to clarify this matter for YFTC, and that the Government believes it was not required to do so. *(See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 20–21 ("[I]f [YFTC] had questions about the actual deadlines or difficulties in correcting their submissions, all [it] had to do was contact one of the two persons identified in the letters by telephone for clarification or assistance.").) Finally, the Government's argument that YFTC should have been able to sort out the actual intended date for submission is impossible to credit. *(See, id.* at 20 ("If Commerce had, in fact, intended to impose a deadline of two business days, it would not have provided a dif-

ferent deadline in a later paragraph of the letters.").)[20] Therefore, because Commerce's letters did not provide YFTC with an adequate opportunity to rebut the nonmarket economy presumption of state control, Commerce's decision to apply the PRC-wide margin based on facts available and adverse inferences as to YFTC's merchandise is not in accordance with law. *Ta Chen,* 23 CIT at 819.

B. Nantong Delu

While the *Final Results* are defective as to YFTC, the court is not convinced that Nantong Delu was similarly affected by Commerce's lack of clarity. First, the record shows that, not only had Nantong Delu communicated with Commerce concerning the alleged deficiencies in its submissions, but that it had begun to comply with such requests, and asked for and received an extension of time to do so. Second, unlike with YFTC, whatever ambiguity remained from Commerce's earlier deficiency letters was cured, as to Nantong Delu, when Commerce granted the requested extension of time and, in doing so, provided Nantong Delu with clear instructions and an unambiguous final submission date. Having provided adequate notice and receiving no response from Nantong Delu, Commerce found:

> In the instant administrative review, [Nantong Delu] failed to provide complete and accurate responses which could be used in the determination of separate rates. Therefore, consistent with Department practice, we are treating [Nantong Delu], together with all other PRC companies that have not established that they are entitled to separate rates, as a single enterprise subject to government control.

Prelim. Results, 64 Fed. Reg. at 55,239. Thus, because Nantong Delu did not rebut the nonmarket economy presumption of state control, Commerce assigned the country-wide antidumping duty margin of 201.63 percent to its merchandise.

Ocean Harvest argues, though, that Commerce's use of the country-wide margin as to Nantong Delu's merchandise was improper because the data underlying that margin had not been corroborated[21] as to Nantong Delu and, in addition, that the application of the country-wide mar-

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[20] Commerce cannot expect a respondent to pick and choose among several proffered options and arrive at the correct result. *See, e.g., People v. Small,* 391 N.Y.S.2d 192, 194 (N.Y. App. Div. 1977) (finding court could not assume that a jury, when given both an erroneous charge and a correct one, "had the wit and ability * * * to adopt the right one and reject the wrong one." (citing *People v Kelly,* 99 N.E.2d 552, 554 (N.Y. 1954).) Indeed, Commerce has an obligation to provide respondents with clear notice and an adequate opportunity to correct deficiencies in their submissions, *see Borden, Inc. v United States,* 22 CIT 233, 262, 4 F. Supp. 2d 1221, 1245 (1998), *aff'd sub nom. F.lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027 (Fed. Cir. 2000), *rev'd on other grounds Micron Tech., Inc. v. United States,* 243 F.3d 1301 (Fed. Cir. 2001), and here it did not.

[21] In the original investigation Commerce used information contained in the petition as the starting point for its calculation of the country-wide antidumping duty margin. *See Investigation Final Determination,* 62 Fed. Reg. at 41,349–50. Commerce, however, took steps to corroborate the information found in the petition and described its procedure:

> [W]e corroborated the margins in the petition to the extent practicable. *See* Corroboration Memorandum. The petitioner based export prices on actual FOB and CIF price quotations from exporters of Chinese crawfish tail meat. We compared the starting prices used by petitioner to prices derived from U.S. import statistics, and found that the similarity to the import statistics corroborated the starting prices in the petition. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe from South Africa,* 61 FR 24271, 24273 (May 14, 1996); and *Brake Drums and Rotors.* Petitioner made deductions to the export price for

Continued

gin to Nantong Delu was not a proper use of adverse inferences. In essence, Ocean Harvest is seeking to have Commerce calculate a company-specific antidumping margin for Nantong Delu even though that company did not rebut the nonmarket economy presumption of state control. Commerce, however, is not required to take this step. Nonmarket economy companies bear the initial burden of rebutting the presumption of state control in order to receive a company-specific margin and must accept the consequences for failing to do so. Here, Nantong Delu had adequate notice of its burden of proving its independence, *see Initiation of Antidumping and Countervailing Duty Admin. Review, Requests for Revocation in Part and Deferral of Admin. Review,* 63 Fed. Reg. 58,009 (Oct. 29, 1998); (letter from Commerce to Nantong Delu of 4/5/99, Pub. R. Doc. 224 at 1), and, by failing to present such evidence, must accept Commerce's determination it that was part of a single PRC-wide enterprise subject to government control. Had Nantong Delu cooperated in part, it might claim the benefit of a reduced rate. Having presented no evidence that it was entitled to a company-specific rate, however, it was properly assigned the country-wide antidumping duty margin of 201.63 percent.

CONCLUSION

The court remands this action to Commerce so that it may conduct further proceedings in conformity with this opinion, including providing YFTC with adequate notice and a meaningful opportunity to demonstrate its independence from state control and, thus, its entitlement to a company-specific antidumping duty margin. Such remand results are due within ninety days from the date of this opinion. Ocean Harvest shall have thirty days thereafter within which to file comments and Commerce may reply to any such comments within twenty days of their filing.

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foreign inland freight, using the average distance between cities where crawfish tail meat is processed in the PRC and the ports from which the majority of Chinese crawfish tail meat is exported. We could not corroborate the freight rate used by petitioner with other information on the record; therefore, we adjusted the freight rate used in the petition based on the surrogate value used in the margin calculations. We made no other adjustments to export price. Petitioner based normal value (NV) on surrogate factor values obtained from Spanish import data and publicly available information from India. We confirmed the accuracy of petitioner's NV data by comparing the values used in the petition with values obtained from publicly available information collected in these and previous NME investigations. We adjusted petitioner's NV calculation using current Spanish import statistics.

Id. at 41,349 (citing *Corroboration of Data Contained in the Petition in the Antidumping Investigation of Freshwater Crawfish Tail Meat from the P.R.C.,* Pub. R. Doc. 234 at 2–3 (Mar. 18, 1997) *("Corroboration Mem."); Concurrence Mem.; Final Antidumping Determination Freshwater Crawfish Tail Meat from the P.R.C.,* Pub. R. Doc. 235 at 6 (July 24, 1997) (citing *Corroboration Mem.) ("Concurrence Mem.").* In the instant review, Commerce used the same country-wide margin as in the original investigation stating that "[t]he petition rate being used in this proceeding was previously corroborated. We have no new information that would lead us to reconsider that decision." *See Prelim. Results,* 64 Fed. Reg. at 55,239 (citing *Concurrence Mem.).* Thus, this court is not faced with facts that would indicate that Commerce applied a margin that is either "discredited" or which does not bear a "rational relationship" to the matter to which it is applied. *See World Finer Foods v. United States,* 24 CIT ____, ____, Slip Op. 00–72 at 16 (June 26, 2000). Plaintiffs have raised no objection with respect to the corroboration of the PRC-wide margin in the original investigation.

(Slip Op. 02–30)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND PEER BEARING CO. AND L & S BEARING CO., DEFENDANT-INTERVENORS

Court No. 97–12–02156

(Dated March 20, 2002)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *Timken Co. v. United States,* 25 CIT ___, 166 F. Supp. 2d 608 (2001) ("Remand Results"), and Commerce having complied with the Court's remand order and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on December 20, 2001 are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 02–31)

SAVE DOMESTIC OIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND API AD HOC FREE TRADE COMMITTEE, SAUDI ARABIAN OIL CO., PETROLEOS DE VENEZUELA, S.A., CITGO PETROLEUM CORP, PETROLEOS MEXICANOS, PMI COMERCIO INTERNACIONAL S.A. DE C.V., PEMEX EXPLORACIÓN Y PRODUCCIÓN; MOBIL CORP, EXXON CORP, SHELL OIL CO., TEXACO INC., CHEVRON CORP, AND BP AMOCO, INTERVENOR-DEFENDANTS

Court No. 99–09–00558

(Dated March 22, 2002)

Wiley, Rein & Fielding (Charles Owen Verrill, Jr. and *Timothy C. Brightbill)* for the plaintiff.

Shearman & Sterling (Thomas B. Wilner, Neil H. Koslowe, Perry S. Bechky and *Rachel F. Bond)* for intervenor-defendants Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* This court's filing of a petition with the Supreme Court of the United States for a writ of certiorari to the Court of Appeals for the Federal Circuit ("CAFC") has been followed by Intervenors' Motion to Disqualify, filed herein by counsel for intervenor-defendants Pe-

troleos de Venezuela, S.A. and CITGO Petroleum Corporation ("Venezuela"). Only the plaintiff has responded to the motion, which avers that, by

> filing a ***pro se*** petition for a writ of certiorari, which seeks Supreme Court review of the mandamus order vacating a criminal contempt inquiry in this proceeding, his Honor may inadvertently but certainly irretrievably have become a party and a lawyer in this proceeding forcefully advocating positions adverse to those of Defendant the United States. In such circumstances, disqualification is required by 28 U.S.C. §§455(b)(5)(i), (ii). This motion does not raise any claim against his Honor of actual bias or prejudice.
>
> Quite apart from Section 455(b), his Honor's disqualification is also required under Section 455(a). That Section mandates disqualification when a judge's impartiality ***"might reasonably be questioned"*** (emphasis added). Because the purpose of Section 455(a) is to preserve public confidence in the judicial system by avoiding even the appearance of impropriety, disqualification under it turns on facts that would create doubts about the judge's impartiality in the mind of the reasonable man-in-the-street, rather than the mind of the judge or one of the litigants. Where a judge personally intervenes in ongoing litigation to challenge and forcefully advocate before a higher court a position that is diametrically opposed to the interests of one of the parties to that litigation, the ability of the judge impartially to adjudicate other claims against that party in the litigation "might reasonably be questioned" by an informed, objective observer. Here, Intervenors respectfully submit that, because his Honor has filed a ***pro se*** petition for certiorari forcefully advocating a position on the initiation of a criminal contempt inquiry that is diametrically opposed to the interests of the United States, a party Defendant, his Honor's ability impartially to adjudicate other claims against the United States in this proceeding "might reasonably be questioned" by an informed, objective observer.
>
> Disqualification from the captioned case is therefore required by law.

I

From the beginning, this case has been marred by the government. It dismissed the petition(s) of Save Domestic Oil, Inc. ("SDO") for relief under the Trade Agreements Act of 1979, as amended, without even a completely-proper preliminary analysis of the claims therein. When the court granted SDO's appeal from that summary dismissal to the extent of remand to the International Trade Administration, U.S. Department of Commerce ("ITA") for contemplation of commencement of an ordinary and regular preliminary investigation by that agency (and referral for investigation by the International Trade Commission), *Save Domestic Oil, Inc. v. United States,* 24 CIT ____, 116 F.Supp.2d 1324 (2000), or at least to explain its reasons fully in accordance with law for not doing so, the defendant noticed an unlawful appeal to the CAFC from that interlocutory remand order which was joined by Venezuela and other in-

tervenor-defendants. Defendant's concomitant motion(s) for a stay pending its prosecution of that appeal were denied by this court *sub nom. Save Domestic Oil, Inc. v. United States,* 24 CIT ____, 122 F.Supp.2d 1375 (2000), and never granted by the CAFC, which ultimately came to conclude that it had no jurisdiction in the matter.

By the time that appellate decision slipped down unpublished, July 31, 2001, the defendant had been in apparent complete disregard, if not contempt, of this court's interlocutory order of remand for the better part of a year, whereupon counsel were ordered to explain that phenomenon. Initially, they refused, and then proceeded to petition the CAFC for writs of prohibition, one of which was granted ***sua sponte***, followed soon thereafter by another order, unpublished ***per curiam*****,** directing that the Court of International Trade cease and desist any criminal contempt proceedings, which was based upon a second CAFC panel's seeming conclusion that the mere intimation of such proceedings is an abuse of discretion.

Since (1) Congress has provided that the Court of International Trade

> shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority * * * as—
>
> * * * (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command[[1];]

(2) the second CAFC panel seemingly disregarded the first panel's conclusion that their court had no jurisdiction in the matter; (3) government employees do not have license to completely disregard or willfully disobey court orders; (4) the CAFC should not be at liberty to preclude another court from attempting to ensure that its lawful orders are obeyed; and (5) CAFC appellate jurisdiction does not extend to obstruction of discovery in the Court of International Trade, this court was constrained to file its petition with the Supreme Court for relief from the second appellate panel's unfounded order.

That petition has been denied *sub nom. United States Court of Int'l Trade v. United States,* 122 S.Ct. 930 (2002).

II

As recited above, Venezuela's motion to disqualify purports to be based upon the following statutory provisions:

> (a) Any * * * judge * * * of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> * * * * * * *
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

[1] 18 U.S.C. §401.

> (i) Is a party to the proceeding or an officer, director, or a trustee of a party;
> (ii) Is acting as a lawyer in the proceeding.
> * * * * * * * *

28 U.S.C. §455.

A

The motion's primary pincer would be subsection (b), which, it is said,

> sets forth a simple rule: No person can be both judge and party, or judge and lawyer, in the same proceeding.
> The disqualification provisions of 28 U.S.C. §455(b) operate automatically.[2]

Indeed. Hence, the only discussion herein can be about the facts, and whether or not they are within the statute's purview and meaning of "party", "['same'] proceeding" and "lawyer".

If these provisions require "inexorable"[3] enforcement, which this court accepts as the law, strictly construed they do not govern the phenomenon Venezuela attempts to rely on. Clearly, the court neither was, nor has become, either a party to or lawyer in the case bearing CIT No. 99–09–00558, the only parties to which are all named in the caption above, the gravamen of which is and has been judicial review of the ITA's *Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela,* 64 Fed. Reg. 44,480 (Aug. 16, 1999). And those parties and their respective lawyers all strive to protect their particular substantive rights within the confines of that case and the law which governs its resolution.

The court's concern, on the other hand, is and has been the same as in all matters that come before it, namely, that the parties thereto engage in proper practice and orderly procedure. When it became apparent that the defendant herein had completely disregarded and/or willfully disobeyed the court's lawful interlocutory order of remand to the ITA for some 259 days, counsel were necessarily ordered to show cause for such inaction. Their response, in the main, was to obstruct attempted basic, relevant discovery on that issue, retreating in haste to the CAFC with a disingenuous claim that this court had

> threatened to hold in ***criminal*** contempt all present and former officials involved in the government's decision to appeal the remand order.[4]

That is, the government fomented a new proceeding, which was given CAFC Miscellaneous Docket No. 679 (as opposed to that court's docket number 01–1091, which attached to defendant's prior, unlawful, at-

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[2] Intervenors' Motion to Disqualify, p. 6. The motion also points out, *id.* at 7, that subsection 455(e) provides that "[n]o * * * judge * * * shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)."

[3] Intervenors' Motion to Disqualify, p. 7.

[4] Petition for a Writ of Mandamus to the United States Court of International Trade in No. 99–09–00558, Judge Thomas J. Aquilino, Jr., p. 2 (Aug. 17, 2001) (emphasis in original).

tempted appeal on the merits of CIT No. 99–09–00558). That court's ***sua sponte*** order in No. 679 did contain an invitation within the meaning of Federal Rule of Appellate Procedure 21(b)(4) or a direction pursuant to CAFC Rule 21(a)(5) to respond to defendant's petition in chief, which this court was thus constrained to do. The Statement on Behalf of United States Court of International Trade (Aug. 30, 2001) explained at length the precise lie of the government's new proceeding and questioned the CAFC's jurisdiction to sustain it, in part given the first panel's decision on July 31, 2001 regarding lack of jurisdiction.

The second panel seemingly paid that lynchpin issue no heed in thereafter deciding to direct the "Court of International Trade * * * to vacate its orders initiating criminal contempt proceedings." This unfounded intervention compelled its object to petition the Supreme Court of the United States to set it aside—in the interests of proper practice and orderly procedure. *See generally* Petition for Writ of Certiorari, ***In re*** United States ***ex rel.*** United States Court of International Trade (Nov. 1, 2001), U.S. No. 01–684 (Nov. 8, 2001).

Considering Venezuela's instant motion in its most favorable light shows that certiorari petition to be at the core of its present position under 28 U.S.C. §455(b). *See supra* and Intervenors' Motion to Disqualify, pp. 9–11. That is, the motion recognizes the existence of Federal Rule of Appellate Procedure 21(b)(4) and the invitation/direction of the CAFC thereunder (if not its own Rule 21(a)(5)) in concluding that this "Court's statement to the Federal Circuit may not have created a disqualification problem." *Id.* at 8. Rather, the motion points to the attempted invocation of Supreme Court review pursuant to 28 U.S.C. §1254(1) ***viz.***

> [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[,]

and argues therefrom that this court "has thus invoked the status of a party by seeking review under [the foregoing provision], which is available only to a 'party'". Id. at 10. The motion also relies on the definition of "proceeding" found in 28 U.S.C. §455(d)(1), which "includes pretrial, trial, appellate review, or other stages of litigation".

On its face, this definition is broad enough to encompass the proceeding instigated by the government in the CAFC, and which caused this court to become involved and thereafter the court of appeals to become the object of the Supreme Court petition, but that proceeding, now concluded, had no bearing on the merits of CIT No. 99–09–00558. The only case Venezuela's motion considers "instructive"[5] on this issue is *United States v. Craig,* 875 F.Supp. 816 (S.D.Fla. 1994), a case involving an apparent disagreement between judges in neighboring federal districts in Florida as to who should and would preside over a criminal trial of some 30 defendants. When the judge to whom the case was assigned after it was ordered transferred sided with the prosecution regarding the

[5] Intervenors' Motion to Disqualify, p. 7.

changed venue, the defendants obtained a writ from the Court of Appeals for the Eleventh Circuit prohibiting retransfer and moved for that judge's removal from the restrained case on the ground that he had violated the Circuit's rule governing responses to mandamus petitions. The government then joined in that motion, whereupon the chief judge of the transferee district court ordered the case reassigned, but not on the basis of 28 U.S.C. §455(b), rather subsection (a), *supra. Compare* 875 F.Supp. at 817 *with id.* at 818. In short, that case is hardly apposite here. The rule remains that, "[u]nlike §455(a), §455(b) requires an actual interest or bias on the part of the judge"[6], which is not alleged herein. *See, e.g.,* Intervenors' Motion to Disqualify, p. 2 ("This motion does not raise any claim against his Honor of actual bias or prejudice").

B

Hence, the secondary prong of Venezuela's motion is the more subjective standard of 28 U.S.C. §455(a), *supra*, to wit, that a judge's "impartiality might reasonably be questioned." That standard was considered and discussed at length in *Liteky v. United States,* 510 U.S. 540 (1994), which affirmed the judgment of the Court of Appeals for the Eleventh Circuit, if not its pristine holding that ***"matters arising out of the course of judicial proceedings are not a proper basis for recusal",*** 973 F.2d 910 (1992), citing its precedents *United States v. Alabama,* 828 F.2d 1532 (11th Cir. 1987), *cert. denied,* 487 U.S. 1210 (1988); *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958 (5th Cir.), *cert. denied,* 449 U.S. 888 (1980); *Davis v. Board of School Comm'rs of Mobile County,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). The decision of the Supreme Court in *Liteky* is that the "extrajudicial source" doctrine applies to section 455(a) even though it concedes "there is not much doctrine to the doctrine." 510 U.S. at 554. Stated another way, since

> neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extra judicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) "extrajudicial source" ***factor,*** than of an "extrajudicial source" ***doctrine,*** in recusal jurisprudence.
>
> * * * It is enough * * * to say the following: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.,* 384 U.S.[563,] 583 [1966]. In and of themselves *(i.e.,* apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required * * * when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of

[6] *Hoang v. Ummel,* No. 01–3039, 2001 WL 1631716, at *2 (7th Cir. Dec. 17, 2001).

> prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They ***may*** do so if they reveal an opinion that derives from an extrajudicial source; and they ***will*** do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. * * *

Id. at 554–55 (emphasis in original).

Venezuela's instant motion would disregard this dispositive opinion of the Supreme Court, claiming that the

> "extrajudicial source" factor has no relevance in the present case * * * because the actions taken by his Honor which warrant disqualification under §455(a) do not consist of judicial rulings or judicial remarks made by his Honor.

Intervenors' Motion to Disqualify, p. 13 n. 12. But, if this is what the record developed to date at bar reflects, the movants' focus must, by definition, be ***extra***judicial. As indicated above, the motion takes the position that,

> by personally filing a petition for a writ of certiorari in the Supreme Court, his Honor has aligned himself against a party here, namely, the United States. His Honor has also forcefully advocated in support of his petition. Such personal involvement by his Honor to maintain his Honor's initiation of a criminal contempt inquiry against the United States and its counsel has, unfortunately, created a circumstance in which his Honor's impartiality **"*might*** reasonably be questioned" within the meaning of Section 455(a)(emphasis added). * * *

Id., p. 13.

Whatever the label, whether extra- or intrajudicial, parties seeking recusal bear a heavy burden to substantiate their claims. *E.g., Baldwin Hardware Corp. v. Franksu Enterprise Corp.,* 78 F.3d 550, 557 (Fed.Cir.) *cert. denied sub nom. Klayman & Assocs., P.C. v. Baldwin Hardware Corp.,* 519 U.S. 949 (1996). Here, little is presented by Venezuela beyond that quoted verbatim from its motion above—in the context stated, namely, attempting to assure proper practice and orderly procedure by all parties (and by the courts, as well). Surely, such traditional and necessary pursuit cannot, ***per se,*** be ground for grant of a motion to recuse. As the Supreme Court has concluded:

> * * * ***Not*** establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern

> and short tempered judge's ordinary efforts at courtroom administration—remain immune.[7]

III

Denial of Venezuela's motion as presented, however, does not necessarily keep the above-captioned case on the best track to final judgment. The focus of that motion pursuant to 28 U.S.C. §455 is on the undersigned. The concern of this court, on the other hand, remains with the parties, in particular the defendant, which has not dispelled its apparent contempt—in violation of 18 U.S.C. §401, *supra*. Indeed, the government's unacceptable stance during the months preceding the court's order to show cause became all the more patent once its counsel appeared in response thereto and also precipitously dragged the matter before the CAFC, where they misrepresented the salient facts and even argued, among other things, that, if there were a basis for commencing a criminal-contempt proceeding, initially it would be up to them to decide. That implausible tack[8] was sailed on to the Supreme Court, where, in opposing a writ of certiorari, the Solicitor General added arguments to the effect (a) that the object of defendant's extraordinary petition(s) to the CAFC was not really a party[9], even though personally named and served in that court's Miscellaneous Docket No. 679 and ordered or invited to respond therein, and (b) that the

> CIT has neither sought nor received the authorization of the Solicitor General to file a certiorari petition.

Brief for the United States in Opposition, p. 22 (Dec. 2001). While accurate, not surprisingly, to have ended its formal opposition to this court's petition to the Supreme Court of the United States on this last bit of legerdemain is perhaps as good an indication as any of the continuing stance of the defendant herein. To be sure, the petitioner ***cum*** respondent government did not explain to either appellate court why it failed to comply with this court's lawful interlocutory order of remand for some 259 days after a stay had been duly denied.

Given the indifference of those courts in Washington, however, any attempt to even discover the details of that dereliction of proper practice and orderly procedure, let alone consider possible remedies based thereon, seems at an end herein, which circumstance thus simply serves as

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[7] *Liteky v. United States,* 510 U.S. at 555–56 (emphasis in original). *Cf. United States v. Grinnell,* 384 U.S. 563, 583 (1966):

> * * * [B]ias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

[8] The government's submissions to both the CAFC and Supreme Court emphasized as controlling *Young v. United States ex rel. Vuitton et Fils, S.A.,* 481 U.S. 787 (1987). But that case simply stands for the proposition that

> counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order.

481 U.S. at 790. While that opinion goes on to aver that "courts can reasonably expect that the public prosecutor will accept the responsibility for prosecution", *id.* at 801, it also recognizes that Federal Rule of Criminal Procedure 42(b) does not require such a referral. That is,

> the rationale for the appointment authority is necessity. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution. * * *

Id. Especially when that branch itself has committed the affront!

[9] This particular contention, of course, runs contrary to that of Intervenors' Motion to Disqualify, *supra.*

another reminder of just how important lawyers are to the always-delicate judicial pursuit of justice. The more they themselves become the partisans, the less they are genuinely and reliably officers of a court and that worthy process. As was stated many years ago:

> * * * Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. * * *

Ex parte Wall, 107 U.S. 265, 274 (1883). While the context of that case was most severe, this opinion continues to have currency in this country's capital. *See, e.g.,* Johnston, *Lawyer Discipline by the Numbers,* Legal Times, p. 18 (March 4, 2002).

Had this court been faced with deciding *Liteky v. United States, supra,* it may well have subscribed to the concurring opinion of four justices, 510 U.S. at 557 *et seq.,* that their colleagues in the majority placed undue emphasis upon the source of the challenged mindset in determining whether disqualification is mandated by 28 U.S.C. §455(a)[10] and that the

> reach of §455(a) is broader than that of §455(b). One of the distinct concerns addressed by §455(a) is that the appearance of impartiality be assured whether or not the alleged disqualifying circumstance is also addressed under §455(b). In this respect, the statutory scheme ought to be understood as extending §455(a) beyond the scope of §455(b), and not confining §455(a) in large part, as the Court would have it.

510 U.S. at 567 (Kennedy, J., concurring in judgment). Whatever the controlling views as to the purview of those statutory sections, each of the U.S. circuit courts of appeals applies abuse of discretion as the standard of review for matters of recusal. *See, e.g., In re Allied-Signal Inc.,* 891 F.2d 967, 970 (1st Cir. 1989), *cert. denied sub nom. ACW Airwall, Inc. v. U.S. Dist. Court for Dist. of Puerto Rico,* 493 U.S. 957 (1990); *In re Drexel Burnham Lambert Inc.,* 861 F.2d 1307, 1312 (2d Cir. 1988); *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n,* 107 F.3d 1026, 1032–33 (3d Cir. 1997); *United States v. DeTemple,* 162 F.3d 279, 283 (4th Cir. 1998), *cert. denied,* 526 U.S. 1137 (1999); *In re Billedeaux,* 972 F.2d 104, 105 (5th Cir. 1992); *United States v. Hartsel,* 199 F.3d 812, 815 (6th Cir. 1999), *cert. denied,* 529 U.S. 1070 (2000); *In re Hatcher,* 150 F.3d 631, 635 (7th Cir. 1998); *In re Kansas Pub. Employees Retirement Sys.,* 85 F.3d 1353, 1358 (8th Cir.), *cert. denied,* 519 U.S. 948 (1996); *Leslie v. Grupo ICA,* 198 F.3d 1152, 1160 (9th Cir. 1999); *Mitchael v. Intracorp., Inc.,* 179 F.3d 847, 860 (10th Cir. 1999); *United States v. Bailey,* 175 F.3d 966, 968 (11th Cir. 1999); *United States v. Pollard,* 959

[10] *Liteky v. United States,* 510 U.S. 540, 567 (1994) (Kennedy, J., concurring in judgment). *Cf. id.* at 563, 566.

F.2d 1011, 1031 (D.C.Cir.), *cert. denied,* 506 U.S. 915 (1992); *Baldwin Hardware Corp. v. Franksu Enterprises Corp.,* 78 F.3d 550, 556 (Fed. Cir.), *cert. denied sub nom. Klayman & Assocs., P.C. v. Baldwin Hardware Corp.,* 519 U.S. 949 (1996).

Exercise of any permissible discretion in this regard is always governed by the interests of justice. In this case, there is no basis for confidence that whatever further decision on the merits, either interlocutory or final, the facts and the law may dictate would be carried out by the defendant, at least pending further review upon proper and orderly appeal to higher authority. This loss of confidence is exacerbated by the fact that the government has the primary responsibility under the Trade Agreements Act of 1979, as amended, to buffer the domestic and foreign competing interests in international trade, with the judicial relief provided in regard thereto essentially secondary and equitable.

Amelioration of this dilemma thus may not be possible in the aftermath of the CAFC's interference. In fact, all that may remain for the undersigned is to recall an adage derived from astute observation of another attempt at orderly, civil society, to wit, ***"Il est dangereux d'avoir raison sur un sujet pour lequel les autorites établiés ont tort",*** and to invite the chief judge to consider reassigning to another judge what remains of this case in the Court of International Trade.

So ordered.