

U.S. Court of International Trade



Slip Op. 17-73

ITOCHU BUILDING PRODUCTS CO., INC., TIANJIN JINCHI METAL PRODUCTS CO., LTD., TIANJIN JINGHAI COUNTY HONGLI INDUSTRY & BUSINESS CO., CERTIFIED PRODUCTS INTERNATIONAL INC., CHIEH YUNGS METAL IND. CORP., HUANGHUA JINHAI HARDWARE PRODUCTS CO., LTD., SHANGDONG DINGLONG IMPORT & EXPORT CO., LTD., TIANJIN ZHONGLIAN METALS WARE CO., LTD., HENGSHUI MINGYAO HARDWARE & MESH PRODUCTS CO., LTD., HUANGHUA XIONGHUA HARDWARE PRODUCTS CO., LTD., SHANGHAI JADE SHUTTLE HARDWARE TOOLS CO., LTD., SHANGHAI YUEDA NAILS INDUSTRY CO., LTD., SHANXI TIANLI INDUSTRIES CO., LTD., CHINA STAPLE ENTERPRISE (TIANJIN) CO., LTD., QIDONG LIANG CHYUAN METAL INDUSTRY CO., LTD., ROMP (TIANJIN) HARDWARE CO., LTD., CYM (NANJING) NINGQUAN NAIL MANUFACTURE CO., LTD. a/k/a CYM (NANJING) NAIL MANUFACTURE CO., LTD., SHANXI PIONEER HARDWARE INDUSTRIAL CO., LTD., and MINGGUANG ABUNDANT HARDWARE PRODUCTIONS CO., LTD., Plaintiffs, THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD., and STANLEY BLACK & DECKER, INC., Consolidated Plaintiffs, v. UNITED STATES, Defendant, MID CONTINENT NAIL CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 12-00065
Public Version

[Commerce's final results in antidumping duty review are remanded. Defendant's motion for partial remand is granted.]

Dated: June 22, 2017

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, argued for plaintiffs. With him on the brief were *Bruce M. Mitchell*, *Mark E. Prado*, and *Dharmendra N. Choudhary*.

Laurence J. Bogard, Neville Peterson, LLP, of Washington, DC, argued for consolidated plaintiffs.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Sosun Bae*, Trial Attorney. Of counsel on the brief was *Jessica DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Ping Gong*.

OPINION

Restani, Judge:

The instant litigation challenges the U.S. Department of Commerce (“Commerce”)’s final results of the second administrative review of the antidumping (“AD”) duty order on certain steel nails from the People’s Republic of China (“PRC”). *Certain Steel Nails from the People’s Republic of China: Final Results and Final Partial Rescission of the Second Antidumping Duty Administrative Review*, 77 Fed. Reg. 12,556, 12,556 (Dep’t Commerce Mar. 1, 2012) (“*Final Results*”); see also *Certain Steel Nails from the People’s Republic of China: Amended Final Results of the Second Antidumping Duty Administrative Review*, 77 Fed. Reg. 24,462, 24,462 (Dep’t Commerce Apr. 24, 2012). Before the court are three motions for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.2, one by plaintiffs Tianjin Jinchu Metal Products Co., Ltd. (“Jinchu”), Tianjin Jinghai County Hongli Industry & Business Co. (“Hongli”), Certified Products International Inc., Chiieh Yungs Metal Ind. Corp., Huanghua Jinhai Hardware Products Co., Ltd., Shangdong Dinglong Import & Export Co., Ltd., Tianjin Zhonglian Metals Ware Co., Ltd., Hengshui Mingyao Hardware & Mesh Products Co., Ltd., Huanghua Xionghua Hardware Products Co., Ltd., Shanghai Jade Shuttle Hardware Tools Co., Ltd., Shanghai Yueda Nails Industry Co., Ltd., Shanxi Tianli Industries Co., Ltd., China Staple Enterprise (Tianjin) Co., Ltd., Qidong Liang Chyuan Metal Industry Co., Ltd., Romp (Tianjin) Hardware Co., Ltd., CYM (Nanjing) Ningquan Nail Manufacture Co., Ltd. a/k/a CYM (Nanjing) Nail Manufacture Co., Ltd., Shanxi Pioneer Hardware Industrial Co., Ltd., Mingguang Abundant Hardware Productions Co., Ltd., and Itochu Building Products Co., Inc. (collectively, “Itochu”); another by consolidated plaintiffs The Stanley Works (Langfang) Fastening Systems Co., Ltd. (“Stanley Langfang”) and Stanley Black & Decker, Inc. (collectively, “Stanley”); and the last by defendant-intervenor Mid Continent Nail Corporation (“Mid Continent”). See Mem. in Supp. of the Rule 56.2 Mot. for Pls. The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker Inc. for J. upon the Admin. R., ECF No. 39–4 (“Stanley Br.”); Pls.’ Rule 56.2 Mot. for J. upon the Agency R., ECF No. 40 (“Itochu Br.”); Mid Continent’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 41 (“Mid Continent Br.”). Also, before the court, is the government’s motion for partial remand. Def.’s Mot. for Voluntary Partial Remand & Consent Mot. for Errata, ECF No. 120 (“Gov’t Mot. for Partial

Remand”). For the reasons stated below, Commerce’s *Final Results* are remanded, and the government’s motion for partial remand is granted.

BACKGROUND

On September 29, 2010, Commerce published a notice of initiation for 222 companies of the second administrative review of the AD order on certain steel nails from the PRC, covering the period of review (“POR”) of August 1, 2009, through July 31, 2010. *Initiation of Anti-dumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 75 Fed. Reg. 60,076, 60,078–81 (Dep’t Commerce Sept. 29, 2010) (“*Initiation Notice*”). On December 16, 2010, Commerce selected the three largest exporters by volume as mandatory respondents: Stanley, Hongli, and Qingdao Jisco Co., Ltd. (“Jisco”). First Respondent Selection Mem. at 6–7, CD 51 pt. 1¹ (Dec. 16, 2010); see *Certain Steel Nails from the People’s Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review and Preliminary Intent to Rescind New Shipper Review*, 76 Fed. Reg. 56,147, 56,148 (Dep’t Commerce Sept. 12, 2011) (“*Preliminary Results*”). After Commerce received requests from both Jisco and Mid Continent to withdraw their respective requests for review of Jisco, Commerce replaced Jisco and selected Jinchi as the third mandatory respondent. Second Respondent Selection Mem. at 2, PD 147 pt. 1 (Jan. 21, 2011); see *Preliminary Results*, 76 Fed. Reg. at 56,148.

Commerce considers the PRC to be a non-market economy (“NME”). In calculating a dumping margin for subject merchandise from an NME country, Commerce compares the goods’ normal value,² derived from factors of production (“FOPs”) as valued in a surrogate market economy (“ME”) country, to the goods’ export price.³ Commerce must use the “best available information” in selecting surrogate data. 19 U.S.C. § 1677b(c)(1)(B) (2006). The surrogate data must “to the extent

¹ Because the public and the confidential version of the record are split into two parts each, public record citations are in the format “PD __ pt. __” and confidential record citations are in the format “CD __ pt. __” with “pt.” referring to part 1 or part 2.

² Normal value is the price

at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price . . . at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price[.]

19 U.S.C. § 1677b(a)(1)(A), (B)(i).

³ Export price is the price of subject merchandise when it “is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.” 19 U.S.C. § 1677a(a).

possible” be from one or more ME countries that are “at a level of economic development comparable to that of the nonmarket economy country, and” are “significant producers of comparable merchandise.” *Id.* § 1677b(c)(4).

On September 12, 2011, Commerce issued its *Preliminary Results*. 76 Fed. Reg. at 56,147. To calculate the surrogate financial ratios,⁴ Commerce relied on the financial statements of three Indian companies: Bansidhar Granites (“Bansidhar”), Nasco Steel Pvt. Ltd. (“Nasco”), and J&K Wire and Steel (“J&K”). *Id.* at 56,154. Moreover, Commerce applied neutral facts otherwise available⁵ to fill gaps created by unreported FOP data from both unaffiliated tollers⁶ and unaffiliated suppliers used by the mandatory respondents. *Id.* at 56,148–49. Commerce noted that Stanley and Jinchi “used unaffiliated tollers for production of tolled intermediate inputs” and found that neither failed to cooperate, even though each respondent was unsuccessful at obtaining FOP data from their tollers, because each respondent documented their attempts to obtain the missing information. *Id.* at 56,148. Commerce also explained that all three mandatory respondents, failed to provide FOP data from unaffiliated suppliers of subject merchandise. *Id.* at 56,149. Although Hongli did provide the FOP data for its supplier before the *Preliminary Results*, Commerce rejected it as unsolicited and untimely because it was submitted after the deadline. *Id.* Nevertheless, Commerce found that no respondent failed to cooperate by not acting to the best of its ability because each “attempted to obtain the FOPs from the unaffiliated producers and documented these attempts.” *Id.* Commerce stated, however, that after the *Preliminary Results*, it would issue questionnaires directly to each of the mandatory respondents’ unaffiliated suppliers for whom FOP data was unreported. *Id.*

⁴ Commerce calculated financial ratios to value factory overhead; selling, general, and administrative expenses; and profit. *Preliminary Results*, 76 Fed. Reg. at 56,154.

⁵ By statute, Commerce may apply “facts otherwise available” pursuant to 19 U.S.C. § 1677e(a). If, when applying facts otherwise available to fill gaps in the record, Commerce determines

that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce, then Commerce, in calculating a dumping margin,] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available[.]

19 U.S.C. § 1677e(b). The term “neutral facts available” refers to a situation where the conditions in § 1677e(a) are met, but Commerce does not apply an adverse inference pursuant to § 1677e(b). The term “adverse facts available” (“AFA”) relates to when Commerce does apply an adverse inference pursuant to § 1677e(b).

⁶ Per prior notices and regulations, Commerce’s use of the term “tollers” apparently refers to subprocessors or subcontractors. *See, e.g.*, 19 C.F.R. § 351.401(h) (2002); *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7330 (Dep’t Commerce Feb. 27, 1996).

On March 1, 2012, Commerce published the *Final Results*. 77 Fed. Reg. at 12,556. In the *Final Results*, Commerce determined it would no longer rely on Nasco's and J&K's financial statements because those data were not contemporaneous with the POR. Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Second Antidumping Duty Administrative Review at 12, PD 117 pt. 2 (Feb. 23, 2012) ("*I&D Memo*"). Instead, Commerce averaged the financial statements of Bansidhar and Sundram Fasteners Limited ("*Sundram*"). *Id.* at 11. As a result of this change, the surrogate financial ratio for factory overhead increased from 2.98% to 22.19%, the ratio for selling, general, and administrative expenses increased from 9.10% to 11.79%, and the ratio for profit increased from 1.13% to 4.99%. Compare Surrogate Values for the Preliminary Results at 16, PD 7–11 pt. 2 (Aug. 31, 2011), with Surrogate Values for the Final Results at 3, PD 106 pt. 2 (Feb. 23, 2012) ("*SVs for Final Results*").

With respect to the facts available determinations, Commerce continued to apply partial neutral facts available to Stanley and Jinchi for the unreported FOP data from their unaffiliated tollers. *I&D Memo* at 18–19, 26–27. Commerce did not apply facts available to Hongli because its unaffiliated supplier of cut plate masonry nails⁷ responded to Commerce's post-*Preliminary Results* request and provided the missing information. *Id.* at 23. To value the unaffiliated supplier's nails, the main input of which is cut steel plate, Commerce selected a surrogate value for cut steel plate derived from Global Trade Atlas ("*GTA*") India import data, rather than relying on other sources on the record. *Id.* at 24–25.

Commerce, however, did apply partial adverse facts available ("*AFA*")⁸ to Jinchi for the missing FOP data from its unaffiliated supplier. *Id.* at 27–28. Commerce justified this differing treatment of missing toller data and missing supplier data, explaining that "tollers simply perform a function at one stage in the production process, whereas unaffiliated suppliers provide finished merchandise that is independently subject to the order." *Id.* at 19; *see id.* at 27. Commerce, thus, decided it would apply an adverse inference to a respondent for its unaffiliated supplier's failure to cooperate. *Id.* at 19, 27.

⁷ The supplier at issue is [[]]. FOPs for Certain Nails Exported by Hongli and Produced by Unaffiliated Supplier at 1, CD 15–17 pt. 2 (Sept. 28, 2011) ("*Hongli Supplier's FOPs*").

⁸ The phrases "partial AFA" and "total AFA" are not referenced in either the statute or the agency's regulations. Total AFA can be understood, within the context of this case, as referring to Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e to arrive at a total replacement margin. Partial AFA, on the other hand, is when Commerce applies an adverse inference to only a portion of a party's data.

After making these changes, Commerce calculated weighted-average AD margins of 3.80%, 47.76%, and 78.27%, for Stanley, Hongli, and Jinchi, respectively. *Final Results*, 77 Fed. Reg. at 12,558. These represented increases in each respondent's margins from the *Preliminary Results*, in which Commerce calculated weighted-average AD margins of 1.24%, 19.59%, and 31.27%, for Stanley, Hongli, and Jinchi, respectively. 76 Fed. Reg. at 56,154. Similarly, the AD margin for the separate rate respondents, which was calculated by weight-averaging the margins of the mandatory respondents, increased from 7.60% in the *Preliminary Results* to 19.30% in the *Final Results*. *Preliminary Results*, 76 Fed. Reg. at 56,151, 56,154–55; *Final Results*, 77 Fed. Reg. at 12,557–58. The PRC-wide rate of 118.04% remained unchanged. *Preliminary Results*, 76 Fed. Reg. at 56,154; *Final Results*, 77 Fed. Reg. at 12,558.

Foreign respondents, collectively, raise several challenges. First, Itochu argues Commerce erred in selecting surrogate GTA India import data to value cut steel plate. Itochu Br. at 19–27. Second, Stanley and Itochu oppose Commerce's reliance on Sundram's financial statements to calculate the surrogate financial ratios. Stanley Br. at 26–40; Itochu Br. at 27–39. Third, Itochu contends that Commerce erred by applying partial AFA to Jinchi's unreported, finished nails produced by its unaffiliated supplier. Itochu Br. at 8–19. Fourth, Itochu challenges the rate assigned to separate rate respondents as unlawfully relying on Jinchi's partial AFA rate. *Id.* at 39–40.⁹

Mid Continent, the domestic petitioner, also takes issue with Commerce's *Final Results*. First, Mid Continent argues that Commerce erred in selecting only three mandatory respondents to review. Mid Continent Br. at 14–19. Second, it contends that Commerce should have applied partial AFA to Stanley and Jinchi for failure to provide FOP data on behalf of their unaffiliated tollers. *Id.* at 19–28. Third, it argues Commerce should have applied partial AFA to Hongli for not acting to the best of its ability by not providing FOP data from its unaffiliated supplier sooner. *Id.* at 19–31.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final results in an administrative review of an AD duty order

⁹ Stanley initially also challenged Commerce's use of zeroing to calculate its weighted-average dumping margin. Stanley Br. at 12–26; Compl. ¶¶ 17–18, *Stanley Works (Langfang) Fastening Sys. Co. v. United States*, No. 12–00080 (CIT Apr. 26, 2012), ECF No. 16. Stanley has since moved to dismiss that claim. Pls.' Mot. for Voluntary Dismissal of the First Count of their Compl. 1–2, ECF No. 98. The court granted that motion. Order 2, July 23, 2013, ECF No. 99.

are upheld unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Respondent Selection

A. Reasonable Number

Mid Continent challenges Commerce’s decision to limit its individual review to only three mandatory respondents because, according to it, doing so fails to accurately represent the Chinese nails industry. Mid Continent Br. at 14–15. Mid Continent avers that three respondents is not a “reasonable number” as required by law, arguing instead for Commerce to review, at least, between four to eight respondents. *Id.* at 15–19. The government and Itochu respond that Commerce acted within its discretion by selecting the three largest exporters by volume for whom a review was requested because this selection provided for broad coverage of subject merchandise. Itochu Bldg. Prod. Inc.’s Resp. to Mid Continent Nail Corp.’s Rule 56.2 Mot. for J. upon the Agency R. 5–13, ECF No. 61 (“Itochu Resp.”); Def.’s Opp’n to Pls.’ Mots. for J. upon the Agency R. 9–13, ECF No. 62 (“Gov’t Br.”).¹⁰

Normally, Commerce “shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.” 19 U.S.C. § 1677f-1(c)(1). The statute, however, provides an exception that “[i]f it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters . . . the administering authority may determine the weighted average dumping margins for a reasonable num-

¹⁰ Itochu also argues that Mid Continent failed to exhaust this claim at the administrative level by not raising it in its post-*Preliminary Results* case brief. Itochu Resp. at 13–15; see 19 C.F.R. § 351.309(c)(2) (requiring exhaustion in an administrative case brief). By statute, the court has discretion to “where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d); see *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013). Requiring exhaustion is not appropriate here. The court has explained that “[a] party may be excused from failure to raise an argument before the administrative agency . . . if it is clear that the agency had an opportunity to consider it.” *Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1104 (1992) (internal citations omitted). This case presents the unique situation where the government conceded at oral argument that Commerce did consider this issue. Tr. of Civil Cause for Oral Arg. at 207, ECF Nos. 107–107–1 (“Tr. of Oral Arg.”) (“[I]n our mind . . . the issue was properly raised in a timely manner, fully briefed by all the parties, and considered by Commerce. So . . . we’re not challenging or alleging that they failed to exhaust their remedies.”). The government’s concession here weighs strongly in favor of not requiring exhaustion as there is no prejudice to the agency. See *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (“Requiring exhaustion can protect administrative agency authority and promote judicial efficiency.”). Thus, the court reaches Mid Continent’s argument.

ber of exporters.” *Id.* § 1677f-1(c)(2) (allowing Commerce to limit its examination either to a “statistically valid” sample of exporters or to exporters importing the largest volume of subject merchandise). There is no “magic number” to satisfy the reasonable number language because “whether a certain number of mandatory respondents is ‘reasonable’ in any particular case is likely to depend on the facts of that case, such as the subject merchandise at issue, the respondents chosen, the mandatory respondents’ share of the total volume of imports, and other factors.” *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1329 (CIT 2015).

Commerce’s decision to individually examine three mandatory respondents in this case is in accordance with law. First, Commerce properly exercised its authority to limit the number of respondents selected for individual examination because the 222 companies for which review was initially requested is clearly a “large” number of respondents pursuant to 19 U.S.C. § 1677f1(c)(2). First Respondent Selection Mem. at 3–4; see *Shenzhen Xinboda Indus. Co. v. United States*, 180 F. Supp. 3d 1305, 1319 n.15 (CIT 2016) (stating that a pool of thirty-eight potential respondents is non-controversially large). And, although Mid Continent submitted a letter withdrawing its request for review of 160 companies including mandatory respondent Jisco, a situation which eventually caused Commerce to select an alternate respondent, the sixty-two respondents remaining in the pool still constitute a “large” number. See *Certain Steel Nails from the People’s Republic of China: Notice of Extension of Time Limits and Partial Rescission of the Second Antidumping Duty Administrative Review*, 76 Fed. Reg. 23,788, 23,789 (Dep’t Commerce Apr. 28, 2011) (“*Partial Rescission*”).

Second, Commerce’s decision to limit its individual examination to the three largest exporters by volume is lawful because, based upon this record, three is a reasonable number. The three mandatory respondents selected accounted for a substantial share of total volume of exports of subject merchandise.¹¹ Although increasing the number of respondents individually examined by two to five total respondents would obviously increase the total percentage of exports

¹¹ When Commerce initially selected respondents, the top three respondents that it selected—Stanley, Hongli, and Jisco—accounted for [] percent of the total volume of subject merchandise exported from the PRC to the United States according to the United States Customs and Border Protection (“Customs”) data relied on by Commerce. See First Respondent Selection Mem. at Attach. 1. After Commerce rescinded its review of Jisco, it replaced Jisco with Jinchi. Second Respondent Selection Mem. at 1–2. According to the Customs data, Stanley, Hongli, and Jinchi, together, still make up [] percent of the total volume of exports of subject merchandise. First Respondent Selection Mem. at Attach. 1.

actually subject to examination, that five may be preferable is not enough to hold that Commerce's decision is unsupported by substantial evidence.

Mid Continent also claims that Commerce's selection of the three largest exporters is not representative of the Chinese nails industry, which includes both large and small producers. Mid Continent Br. at 14. But, Mid Continent does not contest that Commerce lawfully limited its review to the "exporters and producers accounting for the largest volume of subject merchandise from the exporting country," *see* 19 U.S.C. § 1677f-1(c)(2)(B), and it does not make an argument before the court to explain why selecting the next two largest exporters by volume would account for this lack of representativeness attributable to reviewing only the largest and most efficient exporters or producers. Indeed, it appears unlikely for that to be the case given that the next two largest exporters' share of total exports is more similar to the already-selected mandatory respondents, rather than to exporters much further down the list. *See* First Respondent Selection Mem. at Attach. 1. All things being equal, Commerce's decision to limit its examination to the three largest exporters by volume, where those exporters comprise a meaningful share of total volume of exports of subject merchandise, is not contrary to law. The court, however, requires further attention to the circumstances which led to the particular selection.

B. Withdrawal of Requests for Review

The court requires Mid Continent to further explain the circumstances of the respondent selection process. In this case, Commerce initiated the administrative review for 222 companies for which it received a request for review. *Initiation Notice*, 75 Fed. Reg. at 60,078–81. Mid Continent itself initially requested review of 219 companies. Mid Continent Req. for Admin. Review at Attach. A, PD 11 pt. 1 (Aug. 31, 2010). After a review had been initiated and respondents initially selected, Jisco, a mandatory respondent, withdrew its request to be reviewed and, five days later, Mid Continent, probably not coincidentally, also withdrew its request for review of Jisco and 159 other companies. *Partial Rescission*, 76 Fed. Reg. at 23,789. Mid Continent's withdrawal occurred on the last possible day for requests to be withdrawn so that Commerce would rescind the requested reviews in accordance with regulation. *Compare* 19 C.F.R. § 351.213(d)(1) (stating that Commerce will rescind an administrative review, if the party that requested such a review withdraws its request within 90 days of a notice of initiation),

with *Initiation Notice*, 75 Fed. Reg. at 60,076 (initiating the present review on September 29, 2010). This is not the only case in which a domestic party has requested a broad review, only to withdraw a large number of its requests for review. For instance, in cases involving wooden bedroom furniture from the PRC, the practice of withdrawing broad requests for review in exchange for so-called “settlement payments” is both well-documented and concerning. See James R. Hagerty, *Cash Softens a Trade Blow*, Wall St. J. (Feb. 15, 2011), available at <https://www.wsj.com/articles/SB10001424052748704081604576144401022132530>; see also *Wooden Bedroom Furniture from China*, USITC Pub. 4203, Inv. No. 731-TA-1058 at III-2–III-3 (Dec. 2010) (explaining details regarding the payments). There, “Chinese firms . . . agreed . . . each time to pay cash to their U.S. competitors in return for being removed from the review list.” Hagerty, *Cash Softens a Trade Blow*. The concerns raised by these payments are magnified by their economic consequence because, under these arrangements, potential dumping duties that would normally be payable to the government are, instead, dispersed to a private party. 6 U.S.C. § 212(a); see also *Giorgio Foods, Inc. v. United States*, 785 F.3d 595, 598 & n.5 (Fed. Cir. 2015) (explaining that the Byrd amendment was repealed and, therefore, duties for entries made after October 1, 2007, no longer may be distributed to domestic petitioners).

Thus, the facts in this case beg the questions: why was a broad review initially requested? And, how did it come about that Mid Continent withdrew the majority of the requests for review? For the sake of transparency, if payments were made in this case, any information pertaining to such an exchange, as well as the legal basis for the collection of such payments by a party other than the government, should be provided. As detailed in this court’s order, Mid Continent shall provide to Commerce responses to these inquiries.

Mid Continent’s responses may bear on the integrity of the proceedings. If, for instance, a petitioner is manipulating AD margins by taking advantage of Commerce’s regulations allowing for the withdrawal of a request for review, such a situation is not only legally suspect but also would hinder Commerce’s ability to administer the dumping law properly. Both Commerce and the court must seek to preserve the integrity of such proceedings from fraud in order to safeguard public institutions and to allow for the proper administration of justice. See *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360–61 (Fed. Cir. 2008); cf. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (“[T]ampering with the administration of justice . . . is a wrong against the institutions

set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated”). Therefore, on remand, Commerce shall review Mid Continent’s responses to the questions posed by the court, and, as necessary, reopen the record to solicit information from the parties pertaining to those responses. In deciding whether to reopen the record, Commerce should consider the twin goals of preventing fraud on the proceedings and promoting transparency. Finally, Commerce shall determine whether the parties acted in a legal manner or not and what remedy or further proceedings are appropriate if the actions were not lawful.

II. Surrogate Values

Commerce must use the “best available information” from “one or more” surrogate ME countries to value FOPs. 19 U.S.C. § 1677b(c)(1)(B), (c)(4). Although Commerce enjoys broad discretion in determining the best available information, *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011), that discretion is limited by the statute’s objective of calculating dumping margins as accurately as possible, *Calgon Carbon Corp. v. United States*, 145 F. Supp. 3d 1312, 1323 (CIT 2016). Therefore, in order for its selection to be supported by substantial evidence, Commerce’s choice of the best available information “must evidence a rational and reasonable relationship to the factor of production it represents.” *Id.* (quoting *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1191 (2004)). Further, Commerce “must defend its surrogate choices when confronted with data undermining the surrogate’s reliability.” *Blue Field (Sichuan) Food Indus. Co. v. United States*, 949 F. Supp. 2d 1311, 1326 (CIT 2013). A reviewing court evaluates “whether a reasonable mind could conclude that Commerce chose the best available information.” *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

A. Steel Plate¹²

Itochu opposes Commerce’s selection of GTA India import data, i.e., a surrogate value of \$1.68 per kilogram, to value cut steel plate, arguing that Commerce should have relied on a combination of Steelworld India data and Joint Plant Committee (“JPC”) India data, both domestic sources. Itochu Br. at 19–23. Itochu also maintains that

¹² Although the three mandatory respondents consumed steel wire rod in their production of steel nails, see *I&D Memo* at 15, Commerce selected a surrogate value for cut steel plate, which is the main input of the cut plate masonry nails purchased by Hongli from its supplier, *id.* at 24.

Commerce improperly rejected certain surrogate data from other non-primary surrogate countries that impeach the reliability of the selected GTA India import data. *Id.* at 23–27.

The government responds that Commerce properly relied on GTA India import data “specifically match[es] the thickness of the steel plate Commerce sought to value,” whereas the JPC and Steelworld data are based on significantly thicker cut steel plate. Gov’t Br. at 25–27; *see also* Mid Continent Nail Corp.’s Resp. to Pls.’ Rule 56.2 Mots. & Brs. in Supp. 26–29, ECF No. 67 (“Mid Continent Resp.”). As for the other, non-Indian data points, the government and Mid Continent explain that Commerce lawfully considered and rejected those sources. Gov’t Br. at 27–28; Mid Continent Resp. at 29–31.

Commerce’s selection of the GTA India import data to value steel plate is unsupported by substantial evidence. The sources on the record, in order of decreasing value, included: GTA India import data for Harmonized Tariff Schedule (“HTS”) 7208.53.10 (\$1.68 per kilogram), GTA United States import data for HTS 7208.53 (\$0.78 per kilogram), GTA Germany export data for HTS 7208.53 (\$0.78 per kilogram), JPC India data (\$0.78 per kilogram), GTA Germany export data for HTS 7208.53.90 (\$0.77 per kilogram), Europe MEPS data for hot-rolled plate (\$0.75 per kilogram), World HR Steel Plate data for hot-rolled steel plate (\$0.72 per kilogram), India MEPS data for hot-rolled plate (\$0.71 per kilogram), GTA Germany import data for HTS 7208.53.90 (\$0.68 per kilogram), Steelworld India data (\$0.68 per kilogram), and GTA Philippines import data for HTS 7208.53.00.00 (\$0.49 per kilogram).¹³ *See* Itochu Second Pre-Prelim Surrogate Value Rebuttal Submission at Exs. 2A–2N, PD 277 pt. 1 (June 24, 2011) (“Itochu Second Pre-Prelim SV Submission”).¹⁴ In its

¹³ For the six-digit tariff heading, the 2010 HTS heading for 7208.53 covers “Flat-rolled products of iron or nonalloy steel, of a width of 600 mm or more, hot-rolled, not clad, plated or coated: . . . Other, not in coils, not further worked than hot-rolled: . . . Of a thickness of 3 mm or more but less than 4.75 mm.” *See, e.g.*, U.S. Int’l Trade Comm’n, Harmonized Tariff Schedule of the United States Ch. 72 (2010), *available at* https://www.usitc.gov/sites/default/files/publications/docs/tata/hts/bychapter/1000c72_0.pdf (last visited June 9, 2017); *see also* Itochu Second Pre-Prelim Surrogate Value Rebuttal Submission at Exs. 2C–2H, PD 277 pt. 1 (June 24, 2011) (“Itochu’s Second Pre-Prelim SV Submission”). By contrast, the relevant JPC value covers steel plate for 6 millimeters, and the JPC data also includes prices for thicknesses of 10, 12, and 25 millimeters. Itochu’s Second Pre-Prelim SV Submission at Ex. 2L. And, Steelworld value covers steel plate for 5 to 6 millimeters, and the Steelworld data also provides prices for plate of thicknesses of 8, 10, 12, 16, and 20 millimeters. *Id.* at Ex. 2N.

¹⁴ Regarding the data sources for which average unit value was not provided by the original source in U.S. dollars per kilogram, the value was calculated by Itochu using historical exchange rate information and is included here for ease of reference. Each value is rounded to the nearest hundredth. No party in this action questions the accuracy of Itochu’s conversions.

Final Results, Commerce relied on GTA India import data because Commerce determined that domestic “JPC and Steelworld data for cut steel plate . . . are for significantly thicker cut steel plate than what Hongli’s supplier used to make the subject merchandise.”¹⁵ *I&D Memo* at 25. Thus, Commerce found JPC and Steelworld data did not satisfy its specificity criterion. *Id.*; see Policy Bulletin 04.1, Non–Market Economy Surrogate Country Selection Process (Mar. 1, 2004), available at <http://enforcement.trade.gov/policy/bull04-1.html> (last visited June 9, 2017) (preferring data that reflect “prices specific to the input in question”). Commerce also rejected GTA Philippines data, which was the only other data point from an economically comparable country, due to Commerce’s stated preference to select data from the primary surrogate country. *I&D Memo* at 25. And, Commerce determined that “the other sources on the record, . . . have no probative value.” *Id.* (emphasis added).

First, Commerce improperly failed to consider, by outright rejecting, the other surrogate data sources on the record as having “no probative value.” *Id.* Commerce explained that these other data instead are: “1) for hot rolled plate of an unknown thickness (Europe MEPS, World HR Steel Plate, and India MEPS); 2) export values (GTA Germany); and/or 3) from or including countries outside the approved surrogate country list (US import data, GTA Germany, Europe MEPS, and World HR Steel Plate).” *Id.* (footnote omitted). Commerce’s decision, however, to completely disregard this record evidence that “fairly detracts” from its conclusion was unreasonable. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); see also *Blue Field*, 949 F. Supp. 2d at 1326–27. As is discussed in more detail below, record evidence calls into question Commerce’s conclusion that on this record steel plate thickness is an appropriate method for differentiating between surrogate sources. Commerce also failed to provide any rationale for why it does not consider export values in evaluating the best available information.¹⁶ See *I&D Memo* at 25.

¹⁵ [[]], Hongli’s supplier, reported purchasing steel plate that is [[]] thick. Hongli Supplier’s FOPs at Ex. 5.

¹⁶ Instead, Commerce “note[d] that it has rejected similar export data for benchmarking purposes.” See *I&D Memo* at 25 n.78 (citing *Shanghai Eswell Enter. Co. v. United States*, 31 CIT 1570 (2007)). The case cited by Commerce does not support its statement. In *Shanghai Eswell*, Commerce did not base its valuation of raw honey on export price data. See 31 CIT at 1573. The court ultimately remanded to Commerce to adequately explain how it took into account record evidence of a price decline during the POR, a decline that was supported by respondents’ World Trade Atlas export price data showing a decrease in prices over the second half of the POR. *Id.* at 1574–75. There, Commerce claimed that it *did* take the price decline into account, but the court did not deem Commerce’s explanation sufficient. *Id.* Similarly here, Commerce failed to adequately dispose of the relevance of export data that seemingly undermines Commerce’s selected surrogate value.

But, as the court has explained, “export data from countries that were not potential surrogates” may be “sufficient to call into question the reliability of the [selected surrogate] data.” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, Slip Op. 13–30, 2013 WL 920276, at *3, *6 (CIT Mar. 11, 2013). And, Commerce’s decision to summarily reject data from non-economically comparable countries as not probative has similarly been rejected by the court. *See Peer Bearing Co.-Changshan v. United States*, 804 F. Supp. 2d 1337, 1352 (CIT 2011) (“The mere fact that the data do not come from a country at a level of economic development comparable to that of China does not preclude Commerce from considering those data in choosing between [surrogate] data . . .”).

Contrary to Commerce’s conclusion, these data do appear to be relevant. Excluding the GTA India import data and the GTA Philippines import data, all of the nine other data points fall within the narrow range of \$0.68 to \$0.78 per kilogram. Itochu Second Pre-Prelim SV Submission at Exs. 2D–2G, 2I, 2K–2N. These data, therefore, corroborate the Steelworld India value of \$0.68 per kilogram and the JPC India value of \$0.78 per kilogram. *Id.* at Exs. 2L, 2N. At the same time, the data call into question the GTA India import value of \$1.68 per kilogram, which is more than double the highest value in the aforementioned range. *Id.* at Ex. 2C. Such a difference is likely meaningful when dealing with the main input of a relatively inexpensive product such as nails. Indeed, the probative value of these figures may be better understood when considering the comparative reliability of the underlying data. For example, the GTA Germany import value of \$0.68 per kilogram and GTA United States import value of \$0.78 per kilogram are based on much larger quantities of imports—142,890 and 13,423.68 metric tons, respectively—than the GTA India import data—102.85 metric tons. *Id.* at Exs. 2C, 2F–2G. Even the GTA Philippines import value, which derives from a country that Commerce found to be economically comparable to the PRC, is based on a higher quantity of imports—271.37 metric tons—than the GTA India import data. *Id.* at Ex. 2H. Notably, the GTA Philippines import value of \$0.49 per kilogram is even *lower* than any other surrogate value on the record, falling below the aforementioned range of \$0.68 per kilogram to \$0.78 per kilogram, and thereby also undermines Commerce’s selected value. *See id.*

Second, Commerce failed to address record evidence that price does not correlate to steel plate thickness when it rejected the JPC and

Steelworld data as not sufficiently specific.¹⁷ Not only is Commerce unable to point to record evidence to show that thickness drives price, Itochu has supplied several data sources to undermine such a belief. Specifically, the GTA Germany import data, GTA United States import data, and GTA Germany export data all derive from the same six-digit tariff heading and have the same thickness, 3 to 4.75 millimeters, as the GTA India import data. *Id.* at Exs. 2C–2G. But, these sources provide values in the same range as the JPC and Steelworld data.¹⁸ Moreover, domestic India data from JPC, which includes various prices for steel plates of thickness in the range of 6 to 25 millimeters over time, and from Steelworld, which includes various prices for steel plates in the range of 5 to 20 millimeters over time, both indicate that as thickness increases, price slightly increases. *Id.* at Exs. 2L, 2N. But, the GTA India import data is for a thinner steel plate of 3 to 4.75 millimeters and yet has a substantially higher price. *Id.* at Ex. 2C. Thus, contrary to Commerce’s belief that thickness inversely affects price, record evidence shows that relative thickness has little effect on prices of steel plate and, at most, that thicker plate is slightly more expensive. Accordingly, substantial evidence on the record calls into question the reliability of Commerce’s selected surrogate value. The court, therefore, remands for Commerce to consider whether the other data sources render the GTA India import data unreliable and to explain what record evidence supports its decision to disregard surrogate data for varying thicknesses of steel plate.

B. *Financial Ratios*

Stanley and Itochu challenge Commerce’s reliance on Sundram’s financial statements when calculating surrogate financial ratios. Stanley Br. at 26–40; Itochu Br. at 27–39. First, they argue that pursuant to Commerce’s policy to exclude surrogate financial ratios from countries that receive countervailable subsidies, Commerce should have rejected Sundram’s financial statement both because Sundram operates in an Special Economic Zone (“SEZ”) and because Sundram’s financial statement indicated that it received special tax incentives under Section 35(2AB) of India’s Income Tax Act to support its research and development program. Stanley Br. at 27–34; Itochu Br. at 27–32. Regarding this second alleged subsidy, Stanley argues

¹⁷ Commerce’s decision to prefer GTA import data over domestic prices based on thickness is significant given the typical preference for domestic data. See *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 299–300, 366 F. Supp. 2d 1264, 1273–74 (2005) (“A domestic price is preferred for the calculation of surrogate values by prior practice, policy, and logic.”).

¹⁸ Other record evidence for steel plate of unknown thickness, i.e., Europe MEPS, World HR Steel Plate, and India MEPS, all also fall within the same range as the JPC and Steelworld data. See Itochu Second Pre-Prelim SV Submission at Exs. 2I, 2K, 2M.

that Commerce failed to consider a European Union (“EU”) decision finding the aforementioned section of India’s Income Tax Act countervailable. Stanley Br. at 30–34. Second, Stanley and Itochu contend that Sundram is not appropriate as a financial surrogate because it is not a producer of merchandise comparable to subject nails but instead produces costlier goods, such as specialized high tensile fasteners and auto equipment. Stanley Br. at 34–40; Itochu Br. at 32–39.

The government and Mid Continent counter that Commerce acted reasonably because Sundram produces comparable merchandise such as fasteners and draws steel wire rod in its production of those fasteners. Gov’t Br. at 32–34; Mid Continent Resp. at 19–26. The government and Mid Continent also argue that Sundram’s financial statement does not contain evidence that it received countervailable subsidies from its placement in an SEZ nor does the record contain evidence that Commerce had reason to believe or suspect that the Section 35(2AB) subsidies are countervailable. Gov’t Br. at 35–36; Mid Continent Resp. at 14–19. After briefing and oral argument were complete, the government moved for a partial remand because “Commerce incorrectly concluded that the EU never reviewed the specific section [Section 35(2AB)] of the Income Tax Act.” See Gov’t Mot. for Partial Remand at 4.

Commerce “may request a remand . . . in order to reconsider its previous position.” *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Although the court may refuse a remand if Commerce’s “request is frivolous or in bad faith,” the court will typically grant a remand if Commerce’s “concern is substantial and legitimate.” *Id.* A concern is “substantial and legitimate” when (1) Commerce has a compelling justification for its remand request, (2) the particular justification for remand is not outweighed by the need for finality, and (3) the scope of the remand is appropriate. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 882 F. Supp. 2d 1377, 1381 (CIT 2013).

The court grants Commerce’s request for a remand as Commerce has identified a substantial and legitimate concern. Commerce’s justification is compelling because its determination in the *Final Results* is based on an error that directly bears on the appropriateness of using Sundram’s financial statement. See Gov’t Mot. for Partial Remand at 4; see also *I&D Memo* at 11 (“Congress instructed [Commerce] to ‘avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices.’”). Commerce appropriately requests a limited scope for remand: “to consider whether the EU’s determination should cause Commerce to reconsider using Sun-

dram's financial statement." *Id.* Nor do finality concerns outweigh the need for a remand here where the court is remanding other issues for reconsideration. Moreover, there is no allegation or evidence that Commerce's request is frivolous or made in bad faith. Accordingly, the court remands this matter for Commerce to reconsider whether it has reason to suspect or believe that Sundram received countervailable subsidies in the light of the EU's decision finding Section 35(2AB) of India's Income Tax Act countervailable.¹⁹

III. 19 U.S.C. § 1677e

A. *Specific Facts*

Stanley and Jinchi both used "unaffiliated tollers for production of tolled intermediate inputs." *Preliminary Results*, 76 Fed. Reg. at 56,148. As of the *Preliminary Results*, Stanley was unable to obtain FOPs from "a number of its galvanizing tollers" and Jinchi was unable to obtain FOPs from any of its tollers. *Id.* Commerce determined that neither respondent failed to cooperate as "[b]oth respondents attempted to obtain the FOPs from their unaffiliated tollers and documented these attempts." *Id.* Commerce applied neutral facts available to both, using, for Stanley, "the reported FOPs from Stanley's galvanizers because Stanley did not perform galvanizing itself" and using, for Jinchi, "Jinchi's own production experience because Jinchi also performs the same production steps in-house as the tollers." *Id.* at 56,149.

Also, before the *Preliminary Results*, all three mandatory respondents could not obtain FOPs from unaffiliated suppliers from which they purchased subject merchandise nails. *Id.* Commerce did note that, although Hongli eventually provided the missing FOP data, Commerce rejected it as unsolicited and untimely. *Id.* Commerce, however, did not find that the mandatory respondents failed to cooperate "[b]ecause the respondents attempted to obtain the FOPs from the unaffiliated producers and documented these attempts." *Id.* Accordingly, the agency applied neutral facts available, but it explained that it would "issue questionnaires directly to the unaffiliated producers requesting the FOP data." *Id.*

¹⁹ The court will not address the remaining challenges to the use of Sundram's financial statements because remand may moot the remaining challenges. If Commerce, however, continues to rely on Sundram's financial statements after conducting its redetermination, Commerce shall address with some detail Itochu's and Stanley's other concerns, particularly those related to the comparable producer inquiry. *See Stanley Br.* at 26–40; *Itochu Br.* at 27–39; *see also Pls.' Resp. to the Ct.'s Req. for Suppl. Briefing on Recently Issued New & Significant Auth.* 15–17, ECF No. 147 (listing other, subsequent investigations of steel nails in which Commerce addressed whether Sundaram is a producer of comparable merchandise).

Commerce issued such questionnaires to Hongli's and Jinchi's unaffiliated suppliers on September 14, 2011. *See* Itochu Br. Attach. 1 at 1. Commerce did not send a questionnaire to Stanley's supposedly unaffiliated supplier because "in a post-preliminary supplemental, Stanley demonstrated that it maintained ownership of the wire rod and paid for the processing services rather than purchasing subject merchandise from an unaffiliated supplier" and, therefore, Commerce considered that company to be an unaffiliated semi-finished nail *toller* for Stanley. *I&D Memo* at 19. Commerce did not issue these supplemental questionnaires to any of the unaffiliated tollers. *See id.* at 19, 27. Hongli's supplier²⁰ responded to Commerce's request, providing complete FOP data for the purchased masonry nails. *Id.* at 23. Jinchi's supplier of masonry nails²¹ advised that it could not provide the requested FOP data because it is a "small company" that "does not have the capability to respond to [Commerce's] detailed questionnaires" and "has no need to maintain, in the ordinary course of business, the product specific production records required to answer [Commerce's] questions." FOPs for Certain Nails Exported by Jinchi and Produced by Unaffiliated Supplier at 2, PD 20 pt. 2 (Sept. 28, 2011) ("Jinchi Supplier's FOPs").

In the *Final Results*, Commerce continued to select partial neutral facts available to the missing FOP information from Stanley's and Jinchi's unaffiliated tollers. Regarding Stanley,²² Commerce selected "for the semi-finished nail toller, . . . Stanley's own production data as Stanley produces the same nails" and "[f]or the galvanizing FOPs, . . . the reported FOPs from Stanley's reported galvanizers because Stanley did not perform any galvanizing itself." *I&D Memo* at 19. Regarding Jinchi,²³ Commerce did not change its facts available determination and, accordingly, continued to use Jinchi's own production data to fill the gaps created by the unreported FOPs of its tollers. *See id.* at 26–27.

Commerce altered its preliminary determination in certain respects. For instance, Commerce determined that Hongli's unaffiliated supplier cooperated by "submit[ing] timely and complete FOP data" and, consequently, that the use of facts available was no longer

²⁰ The supplier at issue is [[]]. *See* Commerce Req. for FOP Data from Hongli's Supplier at 1, CD 11 pt. 2 (Sept. 14, 2011).

²¹ The supplier at issue is [[]]. *See* Itochu Br. Attach. 1 at 5.

²² Stanley could not obtain FOPs from one semi-finished nails processor, [[]], and from a few galvanizers, [[]]. Mem. of Stanley's Percentage of Missing Toller Factors at 1, CD 80 pt. 2 (Feb. 23, 2012).

²³ Jinchi could not obtain FOPs from [[]] of its tollers. *Compare* Jinchi Sections C & D Suppl. Questionnaire Resp. at Ex. 19, CD 113 pt. 1 (May 16, 2011), *with* Jinchi Suppl. Sec. A Questionnaire Resp. at Ex. 13, CD 105 pt. 1 (Apr. 7, 2011).

appropriate. *Id.* at 23. Also, Commerce applied AFA to Jinchi for the unreported FOPs of its unaffiliated supplier, determining that the supplier is an “interested party” that failed to cooperate. *Id.* at 27. Commerce explained its reasoning for treating unaffiliated tollers and unaffiliated suppliers differently, stating “tollers simply perform a function at one stage in the production process, whereas unaffiliated suppliers provide finished merchandise that is independently subject to the order.” *Id.* at 19, 27. Thus, Commerce applied adverse inferences to Jinchi for the masonry nails purchased from its unaffiliated supplier, “using as the AFA rate the highest calculated [normal value] for subject nails.” *Id.* at 27–28. The AFA margin selected of 471.28% was much higher than any rate derived from actual production data, and, in fact, was nearly four times higher than the PRC-wide AFA margin of 118.04%.²⁴ See *Itochu Br.* at 3, 8, 15, 18–19; *Tr. of Oral Arg.* at 121; see also *Certain Steel Nails from the People’s Republic of China: Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review* at 29, A-570–909 (Mar. 14, 2011), available at <http://enforcement.trade.gov/frn/summary/prc/20116728-1.pdf> (“[Commerce] . . . assigned the PRC-wide entity an AFA margin of 118.04 percent.”).

B. Application of Facts Available and Adverse Inferences

The Federal Circuit has described the application of AFA as a two-part inquiry. See *Mueller Comercial de Mex., S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1231–32 (Fed. Cir. 2014); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). First, Commerce shall use “facts otherwise available” if “necessary information is not available on the record” or “an interested party or any other person”:

- (A) withholds information that has been requested by [Commerce] . . . ,
- (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . ,
- (C) significantly impedes a proceeding . . . , or
- (D) provides such information but the information cannot be verified . . .

19 U.S.C. § 1677e(a). In using facts otherwise available, Commerce must fill gaps in the record if it has received less than the full and

²⁴ Throughout its brief and in a public oral argument, *Itochu* repeatedly states that the AFA rate selected by Commerce translated to a margin of 471.28%. *Itochu Br.* at 3, 8, 15, 18–19; *Tr. of Oral Arg.* at 121. No party contests the accuracy of the stated percentage.

complete facts needed to make a determination because a party has failed to provide requested information within the deadline for submission. *Nippon Steel*, 337 F.3d at 1381 (“The reason for the failure is of no moment.”).

Second, Commerce may apply an adverse inference in selecting from the facts otherwise available, or AFA, if “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). A party fails to cooperate to the best of its ability when it fails “to do the maximum it is able to do.” *Nippon Steel*, 337 F.3d at 1382. In determining whether a party has failed to do the maximum it is able to do, Commerce first “make[s] an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations.” *Id.* Commerce also then

make[s] a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent’s lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83.

Commerce acted within its discretion both by refusing to apply facts available to Hongli because Hongli and its supplier provided all relevant FOP data and also by applying neutral facts available to Stanley for the unreported FOPs of its unaffiliated tollers. Furthermore, although Commerce properly decided to apply neutral facts available to Jinchi for the unreported FOPs of its unaffiliated toller, Commerce erred when it applied an adverse inference to Jinchi for the missing data from its unaffiliated supplier. Commerce’s *Final Results* are remanded to reconsider whether application of AFA to Jinchi is appropriate and, if not, to apply a neutral facts available rate to Jinchi for the unreported FOPs of its masonry nail supplier.

1. *Hongli*

Mid Continent argues that Commerce erred in not applying partial AFA to Hongli for Hongli’s failure to act to the best of its ability by belatedly providing FOP data for its unaffiliated supplier of cut plate masonry nails. Mid Continent Br. at 28–31. Mid Continent recognizes that Hongli eventually did provide this FOP data but claims that

Hongli only did so after it became aware of its “true margin risk.” *Id.* at 28–30. The government and Itochu reply that Commerce reasonably did not apply AFA because Hongli did not fail to provide any information to Commerce, regardless of Hongli’s intent. Gov’t Br. at 18; Itochu Resp. at 30–39.

Commerce did not err in deciding not to select from the facts otherwise available to value Hongli’s FOPs because there was no missing record information and Hongli fully cooperated with the administrative review. After the *Preliminary Results*, Commerce requested the missing FOP data from Hongli’s supplier.²⁵ See Itochu Br. Attach. 1 at 1; *I&D Memo* at 23. Mid Continent does not challenge Commerce’s decision to request this information from Hongli’s supplier. Thereafter, Hongli’s supplier responded and “submitted timely and complete FOP data for the[] purchased nails,” thereby providing Commerce enough time to consider the data and calculate an AD margin. *I&D Memo* at 23. Whatever the reason for the initial failure of Hongli to provide the unreported FOP data, Commerce had usable data on the record that the agency itself had accepted, meaning Commerce had all necessary information available to it. See 19 U.S.C. § 1677e(a)(1). Mid Continent speculates as to Hongli’s motive for not providing this data earlier, Mid Continent Br. at 28–30, but this argument does not speak to the statutory requirements. See *AK Steel Corp. v. United States*, 28 CIT 1408, 1355 (2004) (“[S]ection 1677e(b) does not inject a *mens rea* consideration into Commerce’s discretion on whether to apply an adverse or neutral inference.”). Commerce acted reasonably in relying on the certified submissions on the record, in which Hongli and its supplier explained why they could not provide the requested information.²⁶ And, Mid Continent asserts, without providing citation to the record, that Hongli only submitted this information after Commerce made clear that it would not verify the

²⁵ [[]] production accounted for a small portion of Hongli’s reported U.S. sales, only [[]] percent. Hongli Sections C & D Questionnaire Resp. at 3, CD 79 pt. 1 (Feb. 25, 2011) (“Hongli Secs. C & D”).

²⁶ Prior to the *Preliminary Results*, Hongli stated in its Section D Questionnaire Response that it was unable to provide this data to Commerce because, although it made “repeated attempts” to obtain the data from its supplier “through meetings, telephone calls and correspondence,” the supplier “has so far refused to permit Hongli access to its accounting and production records necessary to derive factors of production data.” Hongli Secs. C & D at 2. Hongli also stated that it would continue to seek its supplier’s cooperation and report FOP data if it becomes available. *Id.* at 2–3. Almost three months prior to the *Preliminary Results*, Hongli eventually did submit the requested FOP data, but it was rejected as unsolicited and untimely information. *Preliminary Results*, 76 Fed. Reg. at 56,149; see Hongli Revised Section C & D Questionnaire Resp. for Supplier at 4, CD 120 pt. 1 (June 14, 2011) (explaining that the supplier “recently agreed to Hongli’s request [for the FOP data], based on the understanding that its data would be submitted through counsel and would not be shared with Hongli”).

respondent's requests. *See* Mid Continent Br. at 23, 29. In reality, Mid Continent twice requested verification, once on January 10, 2010, and again on June 9, 2011, and this latter request was made a mere five days before Hongli first submitted the FOP data of its unaffiliated supplier. *See* Pet's First Req. for Verification at 1, PD 139 pt. 1 (Jan. 10, 2010); Pet's Second Req. for Verification at 1, PD 266 pt. 1 (June 9, 2011); *see also* Hongli Revised Section C & D Questionnaire Resp. for Supplier at 1, CD 120 pt. 1 (June 14, 2011). There is no record evidence to suggest that Commerce notified the parties that it would not conduct verification before Hongli submitted the FOP data on June 14, 2011. Furthermore, Stanley did not submit its opposition to Mid Continent's latter request for verification until June 16, 2011, two days after Hongli provided the FOP data, indicating a belief by one respondent that verification might still occur. *See* Stanley's Resp. to Pet's Req. for Verification at 1, PD 272 pt. 1 (June 16, 2011).

Instead, Commerce found that the reported data were unchallenged as being either incomplete or inaccurate and, therefore, Commerce relied on them. *I&D Memo* at 23. Commerce also did not make a finding, nor is there record evidence to support a finding, that Hongli or its supplier withheld information, failed to provide the information, significantly impeded the proceeding, or provided unverifiable data. *See* 19 U.S.C. § 1677e(a)(2). Accordingly, Commerce's decision to not apply facts available or an adverse inference to Hongli is supported by substantial evidence. *See Zhejiang DunAn*, 652 F.3d at 1346 ("Commerce first must determine that it is proper to use facts otherwise available *before* it may apply an adverse inference." (emphasis added)).

2. Stanley

Mid Continent challenges Commerce's decision not to apply partial AFA to Stanley for failure to report certain FOP data from Stanley's semi-finished nail toller and certain of its galvanizing tollers. Mid Continent Br. at 19–28. And, in the alternative, Mid Continent disputes Commerce's selected neutral facts available as improperly assuming that the unreported tollers were as efficient Stanley and its other tollers. *Id.* at 25–28.

The government and Stanley argue that Commerce properly did not apply an adverse inference to Stanley because not only did the missing data represent a "small portion of transactions from the subcontractors" but also Stanley cooperated to the best of its ability. Gov't Br. at 13–15; Mem. of Pls. the Stanley Works (Langfang) Fastening Sys. Co., Ltd. & Stanley Black & Decker, Inc. in Opp'n to Mid Continent Nail Corp.'s Rule 56.2 Mot. for J. upon the Admin. R. 15–26, ECF No.

64 (“Stanley Resp.”). They also defend Commerce’s selection of neutral facts available as reasonable. Gov’t Br. at 17; Stanley Resp. at 26–28.

Commerce’s decision to apply neutral facts available to Stanley is supported by substantial evidence. First, Commerce properly decided to select from the facts otherwise available because there were gaps in the record pertaining to the FOPs of Stanley’s semi-finished nail toller and certain galvanizing tollers. Mem. of Stanley’s Percentage of Missing Toller Factors at 1, CD 80 pt. 2 (Feb. 23, 2012) (“Stanley’s Missing Toller Factors”).²⁷ Therefore, Commerce reasonably determined that there were “missing FOPs from [Stanley’s] tollers” and, therefore, applied “partial [facts available], . . . for the tolling FOPs Stanley was unable to obtain.” *I&D Memo* at 18–19; see 19 U.S.C. § 1677e(a)(1), (a)(2)(B).

Second, substantial evidence supports Commerce’s conclusion that the application of an adverse inference is not appropriate as Stanley acted to the best of its ability by cooperating with Commerce’s efforts to obtain the requested FOP data. See *Ta Chen Stainless Steel Pipe Co. v. United States*, 31 CIT 794, 812 (2007) (explaining that application of an adverse inference is discretionary). Early in the proceedings, Stanley was forthcoming and identified its tollers in its initial Section A questionnaire response. Stanley Section A Questionnaire Resp. at Ex. A-26, CD 62 pt. 1 (Jan. 21, 2011). Regarding its galvanizers, Stanley did obtain the FOPs from the majority of its galvanizers by percentage and submitted the FOPs to Commerce in a timely fashion. See *id.*; Stanley Section D Questionnaire Resp. at 28–29 & Ex. D-10, CD 69 pt. 1 (Feb. 11, 2011); see also *Preliminary Results*, 76 Fed. Reg. at 56,148. On May 6, 2011, Stanley responded to Commerce’s questionnaire requesting the remaining galvanizing toller FOPs, explaining that Stanley contacted each of the galvanizers, requested that they provide the necessary FOP data, and that each galvanizer responded that they no longer had the requested documents. Stanley Suppl. Section D Questionnaire Resp. at 7–8, CD 109 pt. 1 (May 6, 2011) (“Stanley Suppl. Sec. D”) (stating that its galvanizers’ reasons included going out of business, losing documents in a fire, or losing records in the moving process); see also Stanley Resp. at 7–8. Stanley documented these efforts and provided proof of its communications to Commerce. Stanley Suppl. Sec. D at Exs. SD-4(a)–SD-4(b). Similarly, for the missing FOP data from the semi-finished nail

²⁷ Specifically, Commerce determined that the semi-finished nail toller at issue, which “processed Stanley’s wire rod into nails,” accounted for only “[] percent of Stanley Langfang’s total output of subject merchandise,” and the unreported galvanizing tollers “performed galvanizing for Stanley representing [] percent of all galvanizing services.” Stanley’s Missing Toller Factors at 1.

toller, Stanley twice responded to Commerce and explained that the requested data would have no material effect on Stanley's reported FOPs because the toller accounted for a de minimis percentage of nail processing. *Id.* at 5; Stanley Suppl. Sections C & D Questionnaire Resp. at 16–18, CD 127 pt. 1 (July 1, 2011) (explaining also that there are “methodological difficult[ies] of merging the semi-finished [nail toller’s] FOPs into Stanley Langfang’s FOPs”).

Although Commerce indicated an intent to again ask Stanley and its semi-finished nail toller for FOP data after the *Preliminary Results*, Commerce changed course and did not request additional information after it determined that semi-finished nail toller was, in fact, a toller rather than a supplier.²⁸ See *I&D Memo* at 19. Commerce agreed with Stanley that “the portion of FOPs Stanley was unable to obtain represented only a small quantity.” *Id.* Commerce, therefore, accepted Stanley's reasonable explanations, did not make an additional documentation request of Stanley for the missing FOP data from its tollers, and concluded that Stanley did not fail to cooperate. See *id.* at 18–19; see also *Maverick Tube Corp. v. United States*, Consol. No. 2016–1649, 2017 WL 2324225, at *3, *8 (Fed. Cir. May 30, 2017) (sustaining, in a countervailing duty investigation, Commerce's decision not to apply AFA to the Government of Turkey, where “there was no evidence that [the Government of Turkey] had access to or maintained the . . . data that it claimed that it was unable to provide”). Absent any additional requests for data, the court cannot say that Stanley failed to cooperate with such requests.

Third, Commerce's selection of neutral facts available is supported by substantial evidence. As neutral facts available, Commerce used Stanley's actual production data to fill the gaps created by the unreported FOPs of the semi-finished nail toller, and Commerce used the galvanizing FOPs of Stanley's reported galvanizers to fill the gaps for the unreported galvanizers as Stanley did not perform galvanizing itself. *I&D Memo* at 19. Mid Continent contends that Commerce unreasonably assumed that the unreported tollers operated as efficiently as Stanley and the other tollers for which there was actual production data on the record. Mid Continent Br. at 26–27. But, Mid Continent fails to cite to record evidence to support its own assumption that these companies did not operate at reasonably comparable efficiencies. It appears that Commerce sought to calculate as accurate a rate as possible by using actual production data, which is reasonable here especially because the missing data accounts for only a

²⁸ Mid Continent does not argue Commerce erred in determining that the semi-finished nail toller is actually a toller, rather than a supplier, nor does it argue that Commerce abused its discretion by not soliciting FOP information from the semi-finished nail toller.

small percentage of overall production. *See* Stanley's Missing Toller Factors at 1. It is telling that Mid Continent does not propose any alternative neutral facts available on the record that Commerce could have selected.²⁹ Commerce was charged with filing gaps in the record and the decision it made is reasonable.

3. *Jinchi*

Mid Continent and Itochu challenge Commerce's facts available determinations relating to Jinchi. Similar to the issues it raises relating to Stanley, Mid Continent argues that Commerce erred by not applying partial AFA to Jinchi for the failure to report FOP data from various tollers that drew nail wire, produced nails, and galvanized nails. Mid Continent Br. at 19–28. Mid Continent also challenges Commerce's selection of neutral facts available. *Id.* at 25–28. Itochu, on the other hand, disputes Commerce's application of a partial AFA margin to Jinchi's finished nails produced by its unaffiliated supplier of masonry nails. Itochu Br. at 8–19. First, Itochu argues that both Jinchi and its unaffiliated supplier acted to the best of their abilities. *Id.* at 8–12. Second, Itochu argues that Commerce cannot apply an AFA rate to Jinchi for the failure of its unaffiliated supplier to cooperate. *Id.* at 12–14. Third, Itochu argues that the partial AFA margin of 471.28% selected by Commerce was unlawful. *Id.* at 15–19.

Regarding Mid Continent's challenges, the government responds that Commerce properly did not apply an adverse inference to Jinchi because Jinchi cooperated by attempting to obtain the FOPs from its unaffiliated tollers. Gov't Br. at 13–15; *see* Itochu Resp. at 15–23. The government contends that Commerce acted within its discretion in not applying an adverse inference and that its rationale to treat tollers and suppliers differently is reasonable. Gov't Br. at 15–17. The government and Itochu also argue that Commerce reasonably relied on Jinchi's own production data as neutral facts available. *Id.* at 17; Itochu Resp. at 24–30.

Regarding Itochu's challenges, the government and Mid Continent respond that Commerce's decision to apply partial AFA is supported by substantial evidence because Jinchi's unaffiliated supplier is an interested party to the proceeding and both Jinchi and its supplier failed to cooperate by providing crucial FOP information. Gov't Br. at

²⁹ Mid Continent notes that "Commerce has sought out surrogate value for a missing step or input, rather than accept respondents' data . . . in previous cases." Mid Continent Br. at 28 n.11. Even if this tool is available to Commerce, Mid Continent does not argue that Commerce is required to do so or that it abuses its discretion by not requesting such data. Commerce was not required to delay the proceedings further by seeking out new data from the parties, when it had actual production data on the record and chose to rely on it.

19–24; Mid Continent Resp. at 4–10. The government and Mid Continent also argue that Commerce lawfully selected as partial AFA the highest calculated normal value for subject nails based on primary data submitted by respondents. *Id.* at 21, 22–23; Mid Continent Resp. at 10–13.

First, Commerce’s decision to select from the facts otherwise available regarding the missing information of Jinchi’s supplier and tollers is supported by substantial evidence. Despite Commerce’s requests for Jinchi to provide missing FOP data from one supplier and certain tollers, Commerce never received the necessary data it required to calculate normal value. *See See* Final Analysis Mem. for Jinchi at 2 n.3, CD 78 pt. 2 (Feb. 23, 2012) (“Jinchi Final Analysis Mem.”). Commerce, therefore, correctly concluded that necessary information was missing from the record and that application of facts available was warranted. *I&D Memo* at 27; *see* 19 U.S.C. § 1677e(a)(1), (a)(2)(B).

Second, although Commerce properly determined that adverse inferences were not warranted for the unreported FOPs of Jinchi’s tollers, Commerce improperly applied an adverse inference to Jinchi for the failure to cooperate of a separate, unaffiliated supplier. Since the initiation of the present suit, the Federal Circuit has held that 19 U.S.C. § 1667e(b) does not bar Commerce from “drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party.” *Mueller*, 753 F.3d at 1236; *see also* 19 U.S.C. § 1677e(b)(1) (“[Commerce] may use an inference that is adverse to the interests of *that* party in selecting from among the facts otherwise available.” (emphasis added)). In *Mueller*, a fully-cooperating mandatory respondent exported goods that it purchased from two suppliers, but it was unable to provide cost of production data for one of its suppliers, which had also been selected as a mandatory respondent in the review. 753 F.3d at 1229–30. Not only did Commerce apply an adverse inference to the non-cooperating supplier in calculating that company’s own dumping margin, but Commerce also applied an adverse inference to the fully-cooperating mandatory respondent for the goods purchased from the non-cooperating supplier. *Id.* The Federal Circuit recognized that Commerce may “use[] an evasion or inducement rationale” in applying AFA to a fully-cooperating respondent, such as considering whether the fully cooperating party is in a position to induce the non-cooperating party into providing the missing information or whether the non-cooperating party could simply evade a high AFA margin by

exporting through a different, unrelated company. *Id.* at 1234–35. But, “if the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party.” *Mueller*, 753 F.3d at 1235 (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011)). The Federal Circuit, therefore, cautioned that, in using AFA to compute the margin of a cooperating party, “Commerce cannot confine itself to a deterrence rationale and also must carry out a case-specific analysis of the applicability of deterrence and similar policies,” and also should evaluate if there is a “direct adverse effect” on the non-cooperating party. *Mueller*, 753 F.3d at 1234, 1236.

Commerce failed to conduct the necessary case-specific analysis to determine whether it was appropriate to apply an adverse inference to Jinchi for its supplier’s failure to cooperate.³⁰ Importantly, Commerce never made a finding that *Jinchi* failed to cooperate, and the court will not sustain Commerce’s decision on such a basis. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”). Instead, the record shows that Jinchi continued to work with Commerce to provide the requested data. Jinchi provided a complete list of its suppliers and tollers to Commerce more than five months before the *Preliminary Results*. *See Jinchi Sec. A Questionnaire Resp.* at Ex. A-11, CD 81 pt. 1 (Feb. 28, 2011) (complete suppliers); *Jinchi Suppl. Sec. A Questionnaire Resp.* at Ex. 13, CD 105 pt. 1 (Apr. 7, 2011) (complete tollers); *I&D Memo* at 27. In response to Commerce’s request for FOPs of its suppliers and tollers, Jinchi explained to Commerce that it requested the FOP data from all suppliers and tollers “[f]irst by telephone call and then by a more formal letter, sent via email” and that Jinchi “followed up with these companies by phone and, based on its conversations, Jinchi sent a second letter . . . specifying exactly what information/documentation is needed to respond.” *Jinchi Sections C & D Suppl.*

³⁰ To the extent that Itochu argues that Commerce erred because Jinchi’s supplier acted to the best of its ability, Itochu Br. at 10–11, Commerce’s determination is supported by substantial evidence. Although Jinchi attached a letter from its supplier explaining that [[]] is a small company that does not export to the United States and is without the capacity to respond to Commerce’s questionnaires because it [[]], Jinchi Supplier’s FOPs at Attach. 1; *see Itochu*

Br. at 11, these reasons are not enough under the best of its ability standard. *See Nippon Steel*, 337 F.3d at 1382 (“While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.”). The supplier did not provide *any* cost-related data to assist Commerce’s review, nor did it seek an extension to try to collect at least some relevant documents. It appears reasonable for Commerce to assume that a reasonable Chinese producer would maintain at least some basic accounting documentation regarding costs. This complete lack of cooperation and failure to make any real attempt to provide information is the type of behavior for which AFA is typically warranted.

Questionnaire Resp. at 27, CD 113 pt. 1 (May 16, 2011) (“Jinchi Suppl. Secs. C & D”). Despite its efforts, Jinchi was not able to obtain the requested information.³¹ *Id.* Jinchi provided Commerce with documentation of each of the letters it sent to the companies and the letters Jinchi received in response. *Id.* at Exs. 17–19. Jinchi explained that its suppliers and tollers are “small Chinese companies.” *Id.* at 27. Of the companies that did respond to Jinchi, the reasons for being unable to provide the requested FOPs ranged from confidentiality concerns to inability to produce the requested records due to lack of institutional accounting and financial capacity. *See id.* at Ex. 19. Commerce did not make an additional request for the FOPs of Jinchi’s tollers, determining instead that “because Jinchi documented that it attempted to obtain this information, [Commerce does] not find that Jinchi failed to cooperate.” *I&D Memo* at 27.

But, as discussed, Commerce did make an additional request for the missing FOPs from Jinchi’s masonry nails supplier after the *Preliminary Results*. Commerce sought that information directly from Jinchi’s supplier, rather than Jinchi, seemingly recognizing that Jinchi did not have access to the necessary information. *See Itochu Br. Attach. 1* at 1. Jinchi sent a letter to its supplier explaining the importance of providing the requested information to Commerce, but Jinchi’s supplier again responded that it was unable to provide the requested data. *See Jinchi Supplier’s FOPs at 2 & Attach. 1*. Commerce did not make a finding that Jinchi had sufficient control over its supplier such that it could induce cooperation, that Jinchi’s supplier attempted to evade a higher AD rate by using Jinchi as an exporter, or that application of an AFA margin to Jinchi would directly and adversely affect Jinchi’s supplier’s interests.³² Nor does Commerce’s stated rationale explain how Jinchi’s actions with respect

³¹ As Commerce explained, Jinchi could not obtain FOPs from its tollers, which represented “[]% of wire drawing, []% of semi-finished nail making, and []% of galvanizing.” Jinchi Final Analysis Mem. at 2 n.3. And, Jinchi’s unaffiliated supplier of masonry nails accounted for []% of Jinchi’s sales. *Id.*

³² Commerce stated, in general, that it treats unaffiliated suppliers differently because their products are independently subject to an AD order. *I&D Memo* at 27. Commerce did not link its rationale to a potential evasion concern nor did it identify case-specific facts to lead the agency to believe that such evasion would occur. It is not clear from the record that an evasion scheme is occurring, where [] is not included on the list of companies for which Commerce initiated the present or immediately preceding administrative reviews, meaning it has not been assigned a margin in an AD review. *See Initiation Notice*, 75 Fed. Reg. at 60,081; *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 48,224, 48,227–28 (Dep’t Commerce Sept. 22, 2009). In fact, [] stated that it does not export to the United States. Jinchi Supplier’s FOPs at Attach. 1. Thus, unlike in *Mueller*, where the non-cooperating supplier might benefit if Commerce did not apply an adverse inference to the fully-cooperating respondent that purchased nails from it because the non-cooperating supplier was also a mandatory respondent with an AFA margin, the same concern does not appear present here. *See* 753 F.3d at 1229–30, 1234–35.

to its supplier differed in any material way from its actions with respect to its tollers, such that Jinchi failed to act to the best of its ability in supplying the FOPs of its supplier but not its tollers. Commerce's rationale rests, instead, on the role that an unaffiliated party has, rather than the relationship between the respondent and the unaffiliated party, and thereby punishes a company like Jinchi without justifying how applying an AFA margin for the limited missing data of 471.28%, a rate nearly four times higher than the PRC-wide rate, to Jinchi furthers the statute's goal of cooperation. See *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1378 (Fed Cir. 2012) (“[A]pplying an adverse rate to cooperating respondents undercuts the cooperation-promoting goal of the AFA statute.”). The court cannot conclude that Commerce's stated rationale is a reasonable application of its policy goals of inducing cooperation or preventing evasion given “the particular facts,” nor that Commerce properly accounted for “the predominant interest in accuracy,” as required by the Federal Circuit. See *Mueller*, 753 F.3d at 1233; see also *Tianjin Magnesium Int'l Co. v. United States*, Slip Op. 11–17, 2011 WL 637623, *2 (CIT Feb. 11, 2011) (“If [a cooperating respondent] is to receive an AFA rate, Commerce must link [the respondent] to its supplier's failures, as a matter of fact.”). Accordingly, the court remands Commerce's decision to apply an adverse inference to the unreported FOPs of Jinchi's supplier. On remand, Commerce may either make the necessary factual determinations to explain why application of AFA to Jinchi, a fully cooperating party, is appropriate or apply a neutral facts available margin to Jinchi.³³

Third, Commerce's selection of a neutral facts available rate for the missing information of Jinchi's tollers is supported by substantial evidence. Commerce had record evidence for the vast majority of Jinchi's production for each tolled step of the production process. See Jinchi Final Analysis Mem. at 2 n.3. Mid Continent claims that Jinchi's statement that it processed nails in “significantly greater quantities” than its tollers indicates that, under economies of scales principles, that Jinchi would have had lower costs than its tollers. Mid Continent Br. at 26 (quoting Jinchi Suppl. Secs. C & D at 28). But, in the questionnaire response cited by Mid Continent, Jinchi states that it processed nails “in significantly greater quantities than the quantities outsourced,” indicating Jinchi's response does not nec-

³³ In conducting its remand, Commerce shall apply the law in effect at the time that Commerce made its facts available and AFA determinations. See *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1332–33 (CIT 2015). Because the Trade Preferences Extension Act of 2015 (“TPEA”) was signed into law on June 29, 2015, see Pub. L. No. 114–27, 129 Stat. 362 (2015), and Commerce published its facts available and AFA determinations prior to that, the TPEA does not apply on remand.

essarily mean that it processes more nails in absolute terms than its tollers do such that it operates more efficiently. Jinchi Suppl. Secs. C & D at 28. Instead, as with the neutral facts available rate selected for Stanley, Commerce reasonably relied on Jinchi's actual production experience to fill gaps in the record, given that Commerce had complete FOP information for each step of the production process of subject merchandise produced by Jinchi. Having held that Commerce improperly applied an adverse inference to Jinchi, it is premature for the court to decide whether Commerce's selection of an AFA rate was based on substantial evidence or whether Commerce lawfully incorporated the AFA rate into the rate calculated for the fully-cooperating separate rate respondents.³⁴

CONCLUSION

For the foregoing reasons, Commerce's *Final Results* are remanded for Commerce not only to evaluate Mid Continent's responses to the respondent selection process questions posed by the court, but also to reconsider Commerce's valuation of steel plate, its selection of Sundram's surrogate financial statement, and its application of a partial AFA margin to Jinchi for the missing information pertaining to Jinchi's unaffiliated supplier. In all other respects, Commerce's *Final Results* are sustained. It is hereby

ORDERED that Mid Continent provide written responses to Commerce by July 24, 2017, regarding the questions posed by this court, specifically:

1. Why was a broad review initially requested?
2. How did it come about that Mid Continent withdrew the majority of the requests for review?
3. Were payments made in exchange for the withdrawal of the requests? If so, what is the legal basis for the collection of such payments by a party other than the government?

ORDERED that Commerce shall have until September 22, 2017, to file its remand results;

ORDERED that the parties shall have until October 23, 2017, to file objections; and

³⁴ If Commerce continues to rely on an adverse inference for Jinchi and then use the selected AFA rate in the calculation of the separate rate for unexamined companies, it should explain what effect, if any, the Federal Circuit's decision in *Changzhou Wujin* has on such a decision. See 701 F.3d at 1378–79; see also Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873, reprinted in 1994 U.S.C.A.N. 4040, 4201 (providing that Commerce may use “other reasonable methods” where a resulting weighted average margin is not “reasonably reflective of potential dumping margins for non-investigated exporters or producers”).

ORDERED that the government shall have until November 6, 2017, to file its response.

Dated: June 22, 2017

New York, New York

/s/ Jane A. Restani

JANE A. RESTANI

JUDGE



Slip Op. 17–74

GEO SPECIALTY CHEMICALS, INC., Plaintiff, v. UNITED STATES,
Defendant.

Before: Jane A. Restani, Judge
Court No. 16–00247

[Defendant's motion to dismiss action filed under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) is granted.]

Dated: June 27, 2017

David M. Schwartz, Thompson Hine LLP, of Washington, DC, for plaintiff.

Robert M. Norway, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Restani, Judge:

Before the court is defendant United States (“the government”)’s motion pursuant to U.S. Court of International Trade Rule 12(b)(1) to dismiss this action for lack of jurisdiction on the grounds that there is no relief the court can order because all entries at issue have been liquidated. The court posed questions to the parties, which were answered on June 7, 2017, and the court concludes the motion is well taken.

BACKGROUND

GEO Specialty Chemicals, Inc. (“GEO”), a domestic industry entity, brings this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) to challenge *Glycine from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–*

2015, 81 Fed. Reg. 72,567 (Dep't Commerce Oct. 20, 2016) ("*Final Results*"). Of concern to GEO are certain entries ostensibly of Indian origin which GEO believes are actually of Chinese origin and covered by *Antidumping Duty Order: Glycine from the People's Republic of China*, 60 Fed. Reg. 16,116 (Dep't Commerce Mar. 29, 1995).¹ The entries of concern to plaintiff were indeed reported as of Indian origin and were liquidated (final computation of duties) in due course and without antidumping duties between August 7, 2015, and March 25, 2016. There is no dispute that all entries at issue are liquidated.

DISCUSSION

It appears well settled that liquidation of entries moots an action challenging the final results of a periodic administrative review of an antidumping duty order, even if future temporary deposit rates are affected. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983); see also *SKF USA, Inc. v. United States*, 512 F.3d 1326, 1328 (Fed. Cir. 2008). There are two recognized exceptions to this rule, which do not apply here:

- 1) if the rate determination will have an effect on a revocation determination, e.g., *Gerdau Ameristeel Corp. v. United States*, 519 F.3d 1336, 1341 (Fed. Cir. 2008), or
- 2) if the liquidation is in violation of a court-ordered injunction, e.g., *Agro Dutch Industries Ltd. v. United States*, 589 F.3d 1187, 1191–92 (Fed. Cir. 2009).

In its response to the court's questions, GEO posits that this matter involves more permanent relief than a change in deposit rates so as to distinguish it from *Zenith* and its progeny. See GEO Specialty Chemicals, Inc.'s Resps. to Ct.'s Questions 3–7, ECF No. 33 ("GEO Resp."). Both counts of GEO's complaint challenge the *Final Results* for lack of substantial evidence and being otherwise not in accordance with law, basically because GEO believes evidence of fraud was not properly considered. Compl. ¶¶ 21–24, ECF No. 9. This type of challenge to the *Final Results* under 28 U.S.C. § 1581(c) jurisdiction normally cannot go forward once the subject entries are liquidated. See *SKF*, 512 F.3d at 1328; *Zenith*, 710 F.2d at 810.

¹ Apparently, anticircumvention proceedings under 19 U.S.C. § 1677j were conducted in the past, see *Glycine from the People's Republic of China: Final Partial Affirmative Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 73,426, 73,427 (Dep't Commerce Dec. 10, 2012), but Commerce found in the review at issue that there were no shipments of covered Chinese products by the Indian exporters of concern despite plaintiff's allegation that affiliates were exporting the Chinese goods. *Final Results*, 81 Fed. Reg. at 72,567; Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Glycine from the People's Republic of China; 2014–2015 at 5–7, 9–10, PD 149 (Oct. 12, 2016).

The reason that this complaint seeks more than or other than a change in deposit rates is that it is about bringing entries of Indian exporters within the antidumping duty order covering Chinese merchandise.² The question for the court is what remedy could it provide as a result of judicial review of a periodic administrative review determination. There seems to be no remedy available under 28 U.S.C. § 1581(c) jurisdiction with respect to the review at issue. The entries are liquidated and deposit rates are not at issue. To the extent plaintiff seeks specific findings with respect to fraud, such findings would not be a final determination of consequence in the review at issue and would not affect the availability or lack thereof of relief in this periodic review matter.

There are also potential avenues of relief which may benefit a domestic competitor such as GEO in such a situation, but one avenue requires action by the United States under 19 U.S.C. § 1592(d) to recover duties or under 19 U.S.C. § 1592(a)–(c) to collect penalties. *Cf. Am. Furniture Mfrs. Comm. for Legal Trade v. United States*, Slip Op. 17–25, 2017 WL 976019, at *3–4 (CIT Mar. 13, 2017) (explaining that when challenges to final results provide no remedy, 19 U.S.C. § 1592 may provide a means of relief). Another is pursuant to recently enacted legislation that permits parties such as GEO to seek a decision from the Commissioner of U.S. Customs and Border Protection (“Customs”) with respect to the evasion of unfair trade duties and which also provides for judicial review thereof. *See* 19 U.S.C. § 1517(g).³ While there appears to be an anticircumvention remedy in place, *see supra* note 1, plaintiff does not allege that it sought to have Commerce initiate a separate anticircumvention proceeding with respect to the latest issues involving affiliates.⁴ The court cannot say on the briefing before it that plaintiff’s statutory remedies are inadequate so that 28 U.S.C. § 1581(i) might provide a remedy. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (“Section 1581(i) jurisdiction may not be invoked when jurisdiction under another

² According to defendant, the Indian companies originally at issue received the adverse People’s Republic of China-wide rate going forward. The problem for plaintiff is that for this review Commerce found that there were no relevant entries of the Chinese merchandise and, as indicated, the Indian entries now of concern to plaintiff liquidated without antidumping duties. *See Final Results*, 81 Fed. Reg. at 72,567–68.

³ As part of the new remedial scheme under 19 C.F.R. § 165.24 (effective August 22, 2016), Customs may suspend liquidation if there is a reasonable suspicion of evasion. *Id.* § 165.24(b)(1)(i). If suspension comes too late, the § 1592 remedies are still available. *Id.* § 165.24(b)(2).

⁴ Anticircumvention determinations, which affect the scope of an order, are reviewable pursuant to 19 U.S.C. § 1516a(a)(2)(B) and 28 U.S.C. § 1581(c).

subsection of § 1581 is or could have been available, unless the remedy provided under that subsection would be manifestly inadequate.”).

In any case, GEO did not bring this action under 28 U.S.C. § 1581(i) with respect to the U.S. Department of Commerce’s administration or enforcement of the antidumping laws and only now asserts its applicability if its preferred basis of jurisdiction does not apply. GEO Resp. at 4–5. If such an action were plausible, and it seems unlikely on the sparse facts alleged, it is unclear what remedy would be available. As with the action under 28 U.S.C. § 1581(c), the court cannot simply take jurisdiction to declare findings inadequate that have no effect in the matter before it. In fact, plaintiff makes it quite clear that what it is seeking are findings by Commerce that Customs might act on under 19 U.S.C. § 1592. *See, e.g.*, GEO Resp. at 3–7. But, Customs can act without Commerce’s input and so can plaintiff.

Accordingly, this action will be dismissed without prejudice to institution of other actions involving these matters, with a clear jurisdictional basis alleged by plaintiff.

Dated: June 27, 2017

New York, New York

/s/ Jane A. Restani

JANE A. RESTANI

JUDGE