U.S. Court of Appeals for the Federal Circuit

UNITED STATES, Plaintiff-Appellee, v. TREK LEATHER, INC., Defendant, AND HARISH SHADADPURI, Defendant-Appellant.

Appeal No. 2011–1527

Appeal from the United States Court of International Trade in No. 09-CV-0041, Senior Judge Nicholas Tsoucalas.

Dated: September 16, 2014

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for plaintiff-appellee. With him on the brief were *Stuart F. Delery,* Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Franklin E. White, Jr.,* Assistant Director.

John J. Galvin, Galvin & Mlawski, of New York, New York, argued for defendant-appellant.

Before PROST, *Chief Judge,* NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, *Circuit Judges.*[*]

Opinion for the court filed by *Circuit Judge* TARANTO.

TARANTO, *Circuit Judge*.

Harish Shadadpuri transferred ownership of merchandise, while it was in transit to the United States, to a company he chose to be the importer of record for its entry into United States commerce. He also furnished to the hired customs broker, for use in completing and submitting the entry documents required for clearance through the Bureau of Customs and Border Protection (CBP), commercial invoices that materially understated the value of the merchandise, thereby reducing the calculated customs duties. We hold that, by those actions, Mr. Shadadpuri "introduced" the merchandise into United States commerce by means of the undervaluation within the meaning of 19 U.S.C. § 1592(a)(1)(A). Because it is undisputed that he was grossly negligent in his actions, Mr. Shadadpuri violated section 1592(a)(1)(A). We affirm the judgment of the Court of International Trade holding him liable.

[*] Sharon Prost assumed the position of Chief Judge on May 31, 2014. Pursuant to statute, Circuit Judge Plager, who was a member of the original panel in this case, elected not to participate in the decision of the en banc court. Circuit Judge Hughes did not participate in the consideration or decision of this case. Randall R. Rader, who was Chief Judge when en banc review was granted, retired from the position of Circuit Judge on June 30, 2014, and did not participate in this decision.

BACKGROUND

Section 1592(a)(1) of Title 19, U.S. Code, provides:

> (1) General rule
>
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a)(1). That provision was the same in 2004, when the merchandise at issue here was imported. Section 1592 goes on, among other things, to specify procedures for enforcement of the quoted prohibitions and to provide penalties for violations, the authorized penalties depending on whether a violation involves fraud, gross negligence, or negligence. *Id.* § 1592(b), (c).

A

This case began in 2009, when the government filed a complaint in the Court of International Trade, invoking that court's jurisdiction under 28 U.S.C. § 1582 and alleging a violation of section 1592(a)(1). The complaint names Trek Leather, Inc., and Mr. Shadadpuri as defendants, alleging that Mr. Shadadpuri was Trek's president, and directed its business, at the time at issue. It charges that, between February 2, 2004, and October 8, 2004, the two defendants "entered or introduced or attempted to enter or introduce men's suits into the commerce of the United States" by means of "false acts, statements and/or omissions" that "understated the dutiable value of the imported merchandise" for the 72 itemized entries, resulting in an underpayment of $133,605.08 in duties. Complaint, *United States v. Trek Leather, Inc.*, Case No. 1:09-cv-00041-NT (Ct. Int'l Trade Jan. 28, 2009), at 1–2. According to the complaint, CBP had issued a penalty notice, and some of the properly calculated duties, and all of the

penalties CBP sought to impose, remained unpaid. *Id.* at 2–3. The complaint includes separate counts alleging fraud, gross negligence, and negligence, and it seeks to recover penalties, unpaid duties, and interest. *Id.* at 3–5.

In late 2010, after discovery took place, the government filed a motion for summary judgment of liability. The defendants opposed the motion; they also moved to dismiss the fraud count and argued that Mr. Shadadpuri personally could not be liable without fraud. The filings and accompanying evidence establish the following facts beyond genuine dispute. We rely mainly on the government's statement of uncontested facts ("Gov't Facts") and the defendants' response, which admits most of the government's stated facts ("Def. Facts").

Trek "is the importer of record for men's suits reflected in the 72 entry lines at issue in this case," and Mr. Shadadpuri is the president and sole shareholder of Trek, whose activities he directed from January 2003 to December 2004. Gov't Facts at 1, 6.[1] From February 2, 2004, to October 8, 2004, "Mr. Shadadpuri imported men's suits through one or more of his companies, including Trek." *Id.* at 1. "Mr. Shadadpuri, through Trek and/or one of his other companies, provided" fabric to the manufacturer of the suits at issue free of charge or at reduced cost. *Id.*; *see id.* at 6. The statute labels such a subsidized component an "assist."[2]

By providing the manufacturer free or subsidized components, like the "fabric assists" here, an importer reduces the manufacturer's costs, and the manufacturer may then reduce the price it charges for the merchandise once manufactured. A suit maker, if it obtains its fabric for free, might shave $100 off the price it charges for a suit. In this case, "[t]he material assists . . . were not part of the price actually

[1] 19 U.S.C. § 1484, titled "Entry of merchandise," defines "importer of record." Paragraph (a)(1) states that "one of the parties qualifying as 'importer of record' under paragraph (2)(B), either in person or by an agent authorized by the party in writing, shall, using reasonable care—(A) make entry therefor by filing with [CBP]" documentation or information needed for CBP "to determine whether the merchandise may be released from custody of [CBP]; (B) complete the entry . . . by filing with[CBP] the declared value, classification and rate of duty applicable to the merchandise, and such other documentation or . . . information as is necessary to enable [CBP] to—(i) properly assess duties on the merchandise . . . ." *Id.* § 1484(a)(1). Paragraph (2)(B) requires that the documentation be filed "either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid license under" 19 U.S.C. § 1641, *i.e.*, a customs broker, and adds: "For the purposes of this chapter, the importer of record must be one of the parties who is eligible to file the documentation or information required by this section." *Id.* § 1484(a)(2)(B).

[2] The statute defines an "assist" to include materials incorporated into the ultimately imported merchandise "if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise." 19 U.S.C. § 1401a(h)(1). *See also* 19 C.F.R. § 152.102(a).

paid or payable to the foreign manufacturers of the imported apparel." Def. Facts at 2. In such circumstances, the manufacturer's invoice price understates the actual value of the merchandise, and if the artificially low invoice price is used as the merchandise's value when calculating customs duties based on value, disregarding assists results in understating the duties owed. To address such an artificial reduction of customs duties, the statute and regulations expressly require that the value of an "assist" be incorporated in specified circumstances into the calculated value of imported merchandise used for determining the duties owed. 19 U.S.C. § 1401a(a)(1), (b)(1), (e)(1); 19 C.F.R. §§ 152.101(b)(1), 152.103(a), (b), (d); *see generally* 19 U.S.C. §§ 1401a (value), 1500 (appraisal), 1503 (dutiable value).

Initially, all of the 72 shipments at issue here "were invoiced and shipped to non-party Mercantile Electronics, LLC," of which Mr. Shadadpuri was president and 40% shareholder. Gov't Facts at 1. But "[w]hile the subject men's suits were in-transit, Mr. Shadadpuri caused the shipments of the imported merchandise to be transferred from Mercantile Electronics to Trek." *Id.* at 1–2. Mr. Shadadpuri did so after receiving the manufacturer's invoice and deciding "which of his various companies had the funds to pay for the shipment." *Id.* at 4; Def. Facts at 3. "Once he determined that the shipments of the men's suits at issue here would be imported by Trek, he contacted his broker, non-party Vandegrift Forwarding Company, Inc. ('Vandegrift'), and directed that the merchandise be transferred while in transit." Gov't Facts at 4.

"The dutiable value of the men's suits imported by Trek and Mr. Shadadpuri did not include the value of the fabric assists." *Id.* at 2; *see id.* at 6. It is undisputed that the omission of that value violated statutory and regulatory obligations to state a proper value when filing the "entry" documentation required "to secure the release of imported merchandise from [CBP] custody." 19 C.F.R. § 141.0a (defining "entry").[3] Moreover, Mr. Shadadpuri has acknowledged that

[3] While leaving many details to agency specification, the statute imposes requirements regarding the submission of invoices, 19 U.S.C. § 1481; entry documents or information addressing value, among other facts, *id.* § 1484 (quoted *supra* n.1); and accompanying declarations, *id.* § 1485. Regulations require all imported merchandise to be "entered" unless a specific exception exists, 19 C.F.R. § 141.4(a); define "entry" as certain documentation or its filing, *id.* § 141.0a; specify that CBP Form 7501, an "entry summary" containing value information, when accompanied by commercial invoices and other documents, satisfies the filing requirement, *id.* §§ 141.61,142.3, 142.11; and impose requirements for filing invoices and/or related documentation showing "[t]he values or approximate values of the merchandise," *id.* § 142.6(a)(3); *see*, *e.g.*, *id.* §§ 141.81, 141.83, 141.86, 141.88, 141.90. *See generally* CBP, *What Every Member of the Trade Community Should Know About: Entry* (2004).

"[p]rior to importing the men's suits at issue in this case, [he] knew that fabric assists must be included on the import documentation." Def. Facts at 2; *see* Gov't Facts at 6. Mr. Shadadpuri had been so informed by CBP (actually, by its predecessor, the U.S. Customs Service) during an investigation of similar undervalued importations in 2002. Gov't Facts at 2–3.

The CBP Form 7501 "entry summary" forms used for entry in this case list Trek as the importer of record, and they were prepared and submitted to CBP by Vandegrift, the customs broker "hired by Harish Shadadpuri," and signed by a Vandegrift representative. *See* Decl. of Michael Toole (Vandegrift vice president), Gov't Summ. Jdgt. App. ("SJ App.") A155; SJ App. A314–78 (corrected 7501s); Def. Summ. Jdgt. App. at CBP1203–2197 (including selected original and corrected 7501s). Vandegrift prepared the submissions based on papers he received from Mr. Shadadpuri and his aides. When the suit manufacturer was ready to ship completed suits, it sent Mr. Shadadpuri an invoice (SJ App. A419–20), and he and his aides sent it to Vandegrift: "I would fax, or my person who would help me would send a fax to the broker and the broker would file the entry." SJ App. A409 (Shadadpuri testimony). *See also* Def. Facts at 3 ("Upon receipt of a manufacturer's invoice, bill of lading and related importation documentation, Mr. Shadadpuri or one of Trek's employees or [the domestic suit seller] or one of its employees would fax a copy to Trek's customhouse broker for the preparation and filing of the required entry."); SJ App. A422–23 ("[W]hen we cut the invoice, we, and the people will send the fax to the broker.").

The "majority of invoices" sent to Vandegrift "did not contain any values or information reflecting the fact that fabric assists had been provided." Gov't Facts at 4; Def. Facts at 3; *see* SJ App. A166–240 (invoices).[4] When CBP began investigating, "Vandegrift determined that the majority of invoices and other information that had been provided by Mr. Shadadpuri did not disclose that any fabric assist had been provided." Gov't Facts at 4. Mr. Shadadpuri then "obtained new invoices from the manufacturer that revealed the fact that a fabric assist was provided, and the amount of the fabric assist." *Id.* Using the new invoices, Vandegrift prepared and submitted to CBP corrected entry documents showing the amount of duties actually due. *Id.* at 5; SJ App. A314–78. CBP calculated that the initial undervaluation had caused a $133,605.08 underpayment of duties—of which

[4] The information sent to Vandegrift included the suit maker's "Multiple Country Declarations" identifying work performed, but those declarations contain no price or other value information. *See*, *e.g.*, Def. Summ. Jdgt. App. at CBP1209, CBP1216, CBP1222.

Trek and its surety paid $88,359.69 between 2005 and 2008, leaving $45,245.39 unpaid. Gov't Facts at 5, 6.

B

The government sought summary judgment of liability, of both defendants, for fraud, for gross negligence, and for negligence. The government recited the elements of its liability argument with some generality, including that "Trek and Mr. Shadadpuri entered, introduced, or attempted to enter or introduce merchandise into the United States" by the proscribed means, Gov't Summ. Jdgt. Mot. at 12 (Nov. 1, 2010), and that "Mr. Shadadpuri is a 'person' subject to liability under section 1592," *id.* at 14. Although the government, in its motion, several times invoked the "enter" language of section 1592(a)(1)(A) without separately mentioning the "introduce" language, *e.g.*, *id.* at 9, 11, 15, it also stated its argument more generally, and the parties' dispute never focused on the different terms in subparagraph (A). The government's motion focused on establishing the different degrees of culpability required for fraud, gross negligence, and negligence, which carry different maximum penalties. *Id.* at 17–24, 24–25, 26–28.

In their short response, defendants did not dispute Trek's liability for negligence or gross negligence. They argued, however, that the charge of fraud should be dismissed because the evidence showed no intent on the part of Trek or Mr. Shadadpuri that the entry documentation to be prepared by the customs broker would omit the value of the assists. Def. Mem. in Opp. to Summ. Jdgt. and in Support of Partial Dismissal at 4–6 (Dec. 17, 2010). Defendants then asserted that, where there was no fraud, Mr. Shadadpuri could not be liable "for negligent or grossly negligent aiding or abetting." *Id.* at 6–7. They relied on *United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1336–38 (Fed. Cir. 1999), in which this court held that liability for aiding or abetting under subparagraph (B) of section 1592(a)(1) requires that a person have certain knowledge regarding the unlawfulness under subparagraph (A) of the action being aided or abetted—a ruling not dependent on whether the underlying violation involves fraud, gross negligence, or negligence. Defendants did not separately argue that Mr. Shadadpuri could not be liable directly for violating subparagraph (A).

In response, the government noted all of the facts that defendants left undisputed, Gov't Reply at 1–3 (Jan. 21, 2011), and it argued that it had proved fraud, *id.* at 4–6. It then argued that Mr. Shadadpuri had sufficient knowledge that he could be liable for aiding or abetting Trek's violations of subparagraph (A), even if Trek did not act fraudu-

lently. *Id.* at 6–12. In reply, defendants reprised their argument against any possible finding of fraud. Def. Reply at 1–7 (Feb. 18, 2011). With respect to Mr. Shadadpuri, they asserted, for the first time, that no person other than an importer of record may be liable under subparagraph (A). Def. Reply at 8–9.

C

The Court of International Trade granted the government's motion for summary judgment of liability of both defendants for gross negligence, denied the motion regarding fraud and negligence as moot, and denied defendants' motion to dismiss. *United States v. Trek Leather, Inc.*, 781 F. Supp. 2d 1306, 1309 (Ct. Int'l Trade 2011). The court began by concluding that the charge of fraud presented a disputed fact question. *Id.* at 1310. It then concluded that Trek conceded gross negligence; that "[a]ny 'person' who engages in the behavior prohibited by 19 U.S.C. § 1592(a) is liable thereunder regardless of whether that 'person' is the importer of record or not"; that "it was Mr. Shadadpuri who had the responsibility and obligation to examine all appropriate documents including all assists within the entry documentation and to forward these assists to his customs broker"; and so "Trek's gross negligence . . . could not have been conceded but for the direct involvement of Mr. Shadadpuri." 781 F. Supp. 2d at 1311–12. For those reasons, the court held both defendants liable for gross negligence, citing section 1592(a) generally; it did not state its holding as resting specifically even on paragraph (1) of section 1592(a), let alone distinguish subparagraph (A) from (B). The court entered a final judgment imposing liability for $45,245.39 in unpaid duties and $534,420.32 in penalties, plus interest. 781 F. Supp. 2d at 1312–13.

D

Mr. Shadadpuri alone appealed to this court, which has jurisdiction under 28 U.S.C. § 1295(a)(5). The government initially cross-appealed the dismissal of its fraud charge as moot, but it dropped the cross-appeal. In this court, the government has defended the Court of International Trade's judgment only on the basis of subparagraph (A) of section 1592(a)(1); subparagraph (B)'s proscription of aiding or abetting is therefore out of the case. With respect to subparagraph (A), Mr. Shadadpuri's contention on appeal is that liability under that provision is limited to importers of record in the absence of fraud.

A divided panel of this court reversed the Court of International Trade's judgment. *United States v. Trek Leather, Inc.*, 724 F.3d 1330 (Fed. Cir. 2013) (later vacated, as noted *infra*). The government did not press a claim for aiding-or-abetting liability, seek to pierce the corporate veil separating Trek and Mr. Shadadpuri, or make a sepa-

rate "introduce" argument in its brief defending the judgment on review. Reflecting those choices, the majority focused on the term "enter" in section 1592(a)(1)(A) and concluded that Mr. Shadadpuri could not be liable for ordinary or gross negligence in violation of that provision. It reasoned that, not being the importer of record or an agent designated in writing, Mr. Shadadpuri was not subject to and did not violate a duty imposed on those making entry under 19 U.S.C. §§ 1484, 1485. *Trek Leather*, 724 F.3d at 1331, 1335–40. Judge Dyk dissented, reasoning that, even in the absence of fraud, subparagraph (A)'s coverage is not limited to importers of record or obligations defined by 19 U.S.C. §§ 1484, 1485. 724 F.3d at 1340–43.

On the government's request for rehearing, this court vacated the panel decision and granted en banc rehearing of the appeal under Fed. R. App. P. 35. *United States v. Trek Leather, Inc.*, 2014 WL 843527 (Fed. Cir. Mar. 5, 2014). We review the Court of International Trade's grant of summary judgment de novo. *See*, *e.g.*, *NEC Solutions (Am.), Inc. v. United States*, 411 F.3d 1340, 1344 (Fed. Cir. 2005). Statutory interpretation is a question of law, and the grant of summary judgment is proper if the facts not genuinely disputed on the summary-judgment record establish liability under the proper statutory interpretation, *i.e.*, no factual dispute exists that is material to the outcome. *Id.*

DISCUSSION

The issues for decision may be clarified by noting what issues are not before us. We are not faced with any issue about aiding-or-abetting liability under subparagraph (B) of section 1592(a)(1); the government relied only on subparagraph (A) in defending liability here. We are presented no issue about whether Mr. Shadadpuri was grossly negligent or whether, if he attempted to or did enter or introduce the merchandise at issue, he did so by means of false material statements or material omissions. Nor do we have any challenge to the amount of the penalty if there is a violation of subparagraph (A).

The only questions presented for decision are whether Mr. Shadadpuri is a "person" covered by section 1592(a)(1)(A) and whether his actions come within the "enter, introduce, or attempt to enter or introduce" language of that provision. On these issues, moreover, Mr. Shadadpuri frames his arguments in all-or-nothing terms: he treats all of the imports of suits identically. Aside from the threshold "person" issue, therefore, the question before us is simply whether he engaged in any conduct respecting any of the suit shipments that constitutes entering, introducing, or attempting to enter or introduce

merchandise into United States commerce under section 1592(a)(1)(A). We conclude that he did.

A

The threshold issue is straightforward. Mr. Shadadpuri is indisputably a "person," and section 1592(a)(1)—including both of its subparagraphs, (A) and (B)—applies by its terms to any "person." There is simply no basis forgiving an artificially limited meaning to this most encompassing of terms, which plainly covers a human being. *See*, *e.g.*, 1 U.S.C. § 1; 19 U.S.C. § 1401(d) (confirming that the term "includes" partnerships, associations, and corporations; no exclusion of individuals).

The origins of the current statutory language confirm, rather than undermine, the plain broad meaning of "person." More than a hundred years ago, in *United States v. Mescall*, 215 U.S. 26 (1909), the Supreme Court rejected a district court's holding that a predecessor of section 1592, even apart from its conduct-proscribing terms, was limited in its reach to a particular subset of persons, namely, those who make entries. The Court held that the statutory language—which covered an "owner, importer, consignee, agent, *or other person*," Act of June 10, 1890, § 9, 26 Stat. 131, 135–36 (emphasis added), quoted at 215 U.S. at 26—applied to persons other than the listed owners, importers, consignees, or agents. 215 U.S. at 32. The Court rejected the argument that, under the principle of *ejusdem generis*, the general term "person" should be narrowed based on the terms that preceded it in the provision. *Id.* at 31–32.

In 1976, section 1592, like its predecessor at issue in *Mescall*, listed certain persons (expanded to "consignor, seller, owner, importer, consignee, agent") and ended with general terminology, "or other person or persons." 19 U.S.C. § 1592 (1976). Congress extensively revised section 1592 in 1978, and as part of that revision, it replaced the listing with, simply, the general term, "person." *Id.* § 1592(a)(1). That simplification certainly does not suggest a narrowing; if anything, by removing the textual basis for an *ejusdem generis* argument, it would have suggested a broadening, if any broadening had remained possible after *Mescall*. And the relevant congressional committees stated that they intended no narrowing. *See* H.R. Conf. Rep. 95–1517, at 10 (1978); S. Rep. No. 95–778, at 17, 18, 20 (1978). There is, in short, no basis for giving "person" in section 1592(a)(1) less than its ordinary broad meaning.

Mr. Shadadpuri argues that certain language in *Hitachi*, 172 F.3d at 1336, supports a narrow meaning of "person" in section

1592(a)(1)(A), limited to an importer of record. But *Hitachi* did not interpret "person," and what it said in passing in the cited passage about subparagraph(A) cannot bind this court sitting en banc and, indeed, was dictum. In *Hitachi*, the relevant claim (against Hitachi Japan) was only under subparagraph (B), for aiding or abetting, not under subparagraph (A); and the claim was rejected for lack of the knowledge required by subparagraph (B). 172 F.3d at 1336–38. *Hitachi* involved no attempt to apply subparagraph (A) to a person who was not an importer of record. Mr. Shadadpuri also cites *United States v. Inn Foods Inc.*, 560 F.3d 1338, 1346 (Fed. Cir. 2009), but even the cited language says only that sections 1484 and 1485 are restricted to importers of record, not that section 1592(a)(1)(A) is; and *Inn Foods*, like *Hitachi*, involved no claim that subparagraph (A) applies to a person other than an importer of record. In any event, we *see* no basis for departing from the plain meaning of "person" for section 1592(a)(1).[5]

Recognizing that a defendant is a "person," of course, is only the first step in determining liability for a violation of either of the subparagraphs. What is critical is the defendant's conduct. The two subparagraphs of section 1592(a)(1) proscribe certain acts and omissions. Deciding whether a defendant is liable requires applying each subparagraph's language specifying the proscribed actions or omissions to determine if the defendant's conduct is within the proscriptions. That inquiry comes after the simple threshold step of noting that the defendant is a "person" covered by section 1592(a)(1). We now turn to the conduct-proscribing language of subparagraph (A) and how it applies to Mr. Shadadpuri's conduct.

B

Section 1592(a)(1)(A) forbids any person to "enter, introduce, or attempt to enter or introduce" merchandise into the United States by certain means with a certain intent or lack of care. We need not and do not decide whether Mr. Shadadpuri attempted to or did "enter" the merchandise at issue, and we therefore do not address the relevance to that question of statutory limitations on what persons are authorized to "enter" merchandise under 19 U.S.C. § 1484. We rely instead on the "introduce" language of section 1592(a)(1)(A). Controlling precedent has long established that "introduce" gives the statute a

[5] We do not address whether *Hitachi* or other decisions might bear on the scope of "enter" in the conduct-specifying language of section 1592(a)(1)(A), an issue we do not decide. As to the "introduce" language of that provision, our decision today necessarily controls over any contrary implication that might be drawn from *Hitachi*.

breadth that does not depend on resolving the issues that "enter" raises. And the term "introduce" readily covers the conduct of Mr. Shadadpuri.

The Supreme Court established the breadth of "introduce" in *United States v. 25 Packages of Panama Hats*, 231 U.S. 358 (1913). The statute at issue was section 9 of the 1890 Act, 26 Stat. 131, 135, as amended in 1909. (*Mescall* involved section 9 before the 1909 amendment.) In the amended form, the statute provided for forfeiture of merchandise, and criminal punishment, "if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States, any imported merchandise by means of any fraudulent or false invoice" or certain other acts or omissions. Tariff Act of 1909, § 28, 36 Stat. 11, 97 (Aug. 5, 1909), quoted in *Panama Hats*, 231 U.S. at 359–60. Consignors shipped merchandise to the United States with invoices that "falsely and fraudulently undervalued the merchandise," 231 U.S. at 359—invoices delivered to an American consulate abroad as required for ultimate entry in the United States, Tariff Act of 1909, § 28, 36 Stat. at 91–92 (amending Act of June 10, 1890, §§ 3, 4, 26 Stat. at 131–32). When the merchandise arrived in New York, neither the consignee nor anyone else called for it or took steps to enter it, so the merchandise was stored by customs officials. 231 U.S. at 359. The Supreme Court held that the statute applied to the "goods not technically entered at the New York customs house," *id.*, based on the word "introduce" added to the statute in 1909.

The Court explained that, before 1909, the statute provided for forfeiture "if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." 26 Stat. at 135, quoted at 231 U.S. at 360. Several district court cases had "held that the language used did not cover the case of fraud by the consignor, nor could the goods be forfeited for the wrongful conduct of any person if the act preceded the making of the documents or taking any of the steps necessary to enter the goods." 231 U.S. at 360 (citing *United States v. 646 Half Boxes of Figs*, 164 F. 778 (E.D.N.Y. 1908), and *United States v. One Trunk*, 171 F. 772 (S.D.N.Y. 1909) (L. Hand, J.)). "In order to close these loopholes and to make the act more effective," the Court explained, Congress amended the statute not only to add "consignor or seller" to the enumerated persons covered (months before *Mescall* confirmed that the listing was not restrictive anyway) but also, of particular importance, to "enlarge[] the scope of conduct for which the goods should be forfeited." 231 U.S. at 361. Specifically:

"Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means 'to introduce any imported merchandise into the commerce of the United States.' " *Id.*

> The Court explained that the new language was critical to broadening the statute's coverage:
>
> This latter phrase necessarily included more than an attempt to enter, otherwise the amendment was inoperative against the consignor against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country there is no extra-territorial operation of the statute whereby he can be criminally punished for his fraud. But when the consignor made the fraudulent undervaluation in the foreign country, and on such false invoice the goods were shipped, and arrived consigned to a merchant in New York, the merchandise was within the protection and subject to the penalties of the commercial regulations of this country, even though the consignor was beyond the seas and outside the court's jurisdiction.

Id. The Court concluded:

> [I]n the present case when the goods, fraudulently undervalued and consigned to a person in New York, arrived at the port of entry there was an attempt to introduce them into the commerce of the United States. When they were unloaded and placed in General Order [official custody in a customs warehouse] they were actually introduced into that commerce, within the meaning of the statute intended to prevent frauds on the customs.

Id. at 362. *See also United States v. 18 Packages of Dental Instruments*, 230 F. 564 (3d Cir. 1916).

Panama Hats confirms that, whatever the full scope of "enter" may be, "introduce" in section 1592(a)(1)(A) means that the statute is broad enough to reach acts beyond the act of filing with customs officials papers that "enter" goods into United States commerce. *Panama Hats* establishes that "introduce" is a flexible and broad term added to ensure that the statute was not restricted to the "technical" process of "entering" goods. It is broad enough to cover, among other things, actions completed before any formal entry filings made to effectuate release of imported goods. We need not attempt to define the reach of the term. Under the rationale of *Panama Hats*, the term covers actions that bring goods to the threshold of the process of

entry by moving goods into CBP custody in the United States and providing critical documents (such as invoices indicating value) for use in the filing of papers for a contemplated release into United States commerce even if no release ever occurs.

What Mr. Shadadpuri did comes within the commonsense, flexible understanding of the "introduce" language of section 1592(a)(1)(A). He "imported men's suits through one or more of his companies." Gov't Facts at 1. While suits invoiced to one company were in transit, he "caused the shipments of the imported merchandise to be transferred" to Trek by "direct[ing]" the customs broker to make the transfer. *Id.* at 1–2, 4. Himself and through his aides, he sent manufacturers' invoices to the customs broker for the broker's use in completing the entry filings to secure release of the merchandise from CBP custody into United States commerce. *Supra* pp. 7–8. By this activity, he did everything short of the final step of preparing the CBP Form 7501s and submitting them and other required papers to make formal entry. He thereby "introduced" the suits into United States commerce.

Applying the statute to Mr. Shadadpuri does not require any piercing of the corporate veil. Rather, we hold that Mr. Shadadpuri's own acts come within the language of subparagraph (A). It is long standing agency law that an agent who actually commits a tort is generally liable for the tort along with the principal, even though the agent was acting for the principal. *Restatement (Second) of Agency* § 343 (1958); *Restatement (Third) of Agency* § 7.01 (2006). That rule applies, in particular, when a corporate officer is acting for the corporation. 3A *Fletcher Cyc. Corp.* § 1135 (2014). We *see* no basis for reading section 1592(a)(1)(A) to depart from the core principle, reflected in that background law, that a person who personally commits a wrongful act is not relieved of liability because the person was acting for another. *See United States v. Matthews*, 533 F. Supp. 2d 1307, 1314 (Ct. Int'l Trade 2007), *aff'd*, 329 F. App'x 282 (Fed. Cir. 2009); *United States v. Appendagez, Inc.*, 560 F. Supp. 50, 54–55 (Ct. Int'l Trade 1983). That is as far as we go or need to go in this case. We do not hold Mr. Shadadpuri liable because of his prominent officer or owner status in a corporation that committed a subparagraph (A) violation. We hold him liable because he personally committed a violation of subparagraph (A).

Relatedly, applying the statute to Mr. Shadadpuri in the circumstances presented is consistent with Congress's specification of a separate rule for aiding or abetting, stated in subparagraph (B) of section 1592(a)(1). That subparagraph prohibits a person from aiding or abetting another's violation of subparagraph (A), thus creating a

form of liability for those who play certain roles in an underlying violation short of committing the violation. And this court has recognized a knowledge requirement inherent in "aiding or abetting." *Hitachi*, 172 F.3d at 1338. In this case, however, we hold that Mr. Shadadpuri himself committed a violation of subparagraph (A). This ruling does not weaken the requirements for "aiding or abetting" liability by those who do not violate subparagraph (A).

Finally, we may rest the decision here on the "introduce" language of section 1592(a)(1)(A) even though the parties did not specifically focus on that language in the Court of International Trade or in their briefs to the panel. The government invoked the entirety of the subparagraph in the Court of International Trade, without limiting itself to the "enter" language. The judgment of that court is not limited to one term within subparagraph(A), or even to subparagraph (A) as a whole, instead imposing liability for violating section 1592(a) generally. And it was not until their last-round brief in that court that defendants argued, as Mr. Shadadpuri argues in this court, that only an importer of record can violate subparagraph (A). It is a direct answer to that broad contention to hold that, whatever may be true for "enter," the "introduce" language of subparagraph (A) covers acts by persons other than importers of record.

The Supreme Court has made clear that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see Allen v. State Bd. of Elections*, 393 U.S. 544, 553–54 (1969). The power must be exercised fairly and prudently, but we *see* no impediment to relying on the "introduce" language of section 1592(a)(1)(A) here. Our doing so addresses the express judgment on appeal and responds to Mr. Shadadpuri's contention. The "introduce" language has a meaning that avoids issues presented by the "enter" language and that requires liability on the undisputed (mostly admitted) facts established by the record. These liability-entailing facts could not change, so a remand for application of "introduce" would be wasteful. In these circumstances, affirming liability based on the "introduce" language is fair, prudent, and efficient.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Court of International Trade.

AFFIRMED

MUKAND, LTD., Plaintiff-Appellant, v. UNITED STATES, Defendant-Appellee, and CARPENTER TECHNOLOGY CORPORATION, Defendant-Appellee.

Appeal No. 2013–1425

Appeal from the United States Court of International Trade in No. 11-CV-0401, Senior Judge Richard W. Goldberg.

Dated: September 16, 2014

Peter J. Koenig, Squire Sanders (US) LLP, of Washington, DC, argued for plaintiff-appellant.

Eric E. Laufgraben, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee, United States. With him on the brief were *Stuart F. Delery,* Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Patricia M. McCarthy,* Assistant Director. Of counsel on the brief was *Justin R. Becker,* Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, of Washington, DC.

Grace W. Kim, Kelley Drye & Warren LLP, of Washington, DC, argued for defendant-appellee, Carpenter Technology Corporation. With her on the brief were *Laurence J. Lasoff* and *Mary T. Staley.*

Before NEWMAN, DYK, and REYNA, *Circuit Judges.*

REYNA, *Circuit Judge.*

Mukand, Ltd. ("Mukand") appeals a decision of the Court of International Trade affirming the Department of Commerce's application of adverse facts available in its calculation of an antidumping duty on Mukand's imports of stainless steel bar from India. The Department of Commerce applied adverse facts available ("AFA") after Mukand failed to provide production cost data broken down by product size as requested on five separate occasions. For the reasons set forth below, we *affirm.*

I

Upon the receipt of a proper request, the Department of Commerce ("Commerce") is required to review and reassess its antidumping duty orders at least once each year. 19 U.S.C. § 1675(a). On March 30, 2010, at the request of domestic interested parties, Commerce initiated the current administrative review on an outstanding antidumping duty order on stainless steel bar from India for the period of February 1, 2009, through January 31, 2010. As part of this review, Commerce issued to Mukanda series of questionnaires designed to obtain information necessary to calculate Mukand's dumping margin. These questionnaires asked Mukand to provide, among other things, its costs of producing different sizes of stainless steel bar. Product size

is one of six product characteristics determined by Commerce to be significant in differentiating between steel bar products, the other five being general type of finish, grade, re-melting, type of final finish, and shape. Commerce thus sought product-specific cost information to ensure that it compared similar products in its price-to-price comparisons, calculated a correct difference-in-merchandise adjustment, and arrived at an accurate constructed normal value for Mukand's merchandise.

Upon receiving Mukand's response to its initial questionnaire, Commerce discovered that Mukand assigned the same production costs across all product sizes. Mukand did not explain its rationale for this approach despite the questionnaire's request to "quantify and explain" any belief that size, or any other physical characteristic, is an insignificant cost factor. Commerce informed Mukand that it did not consider this approach to be reasonable and asked that Mukand produce size-specific cost information, regardless of whether it tracked such information in its normal accounting records. Alternatively, Commerce again asked Mukand to "quantify and explain" any reasons for believing that size-based cost differentials are insignificant. Mukand responded with a brief statement that where product grade and type of finishing operation are the same, direct material costs do not vary with size. In a second supplemental questionnaire, Commerce reiterated its need for either size-specific cost estimates or a more thorough narrative quantifying and explaining Mukand's belief that size is not a cost factor. Again, Mukand asserted without detailed support that size does not affect costs when all other physical characteristics remain the same. In a third supplemental questionnaire, Commerce again reiterated its need for size-specific cost information, noting:

> [I]t is not necessary for Mukand to calculate [control number ("CONNUM")] specific costs in its normal books and records in order to differentiate cost differences between CONNUMs that have different physical characteristics when reporting to the Department *as long as the cost differences reported to the Department are based on reasonable and verifiable methods.*

J.A. 2063 (emphasis added). Mukand responded with a short statement that it does not keep track of size-specific costs and reasserted its belief that size-based costs are insignificant "as smaller sizes can be processed at higher speed than to [sic] larger size." J.A. 2064.

Unsatisfied with Mukand's response, Commerce sought this information one last time. In a fourth supplemental questionnaire, Commerce noted that it sought cost data with respect to two

factors—rolling time and weight—and asked a series of specific questions designed to obtain the elicited information. These questions included a sample chart for Mukand to complete regarding size, weight, and rolling time. Commerce instructed Mukand to contact it if its request was unclear, if Mukand was unable to supply the information, or if Commerce was otherwise mischaracterizing Mukand's production process. Commerce also warned that "[f]ailure to provide the requested information may result in the Department deciding to rely on facts available, as required by section 776(a) of the Tariff Act of 1930, as amended, in our preliminary results." J.A. 2075. In its response, Mukand again restated its reasons for not reporting size-specific costs, concluding that there "is no reasonable *and* verifiable way to do what is requested." J.A. 2074 (emphasis altered). Mukand never contacted Commerce directly to ask for clarification or assistance of any kind.

Commerce determined that Mukand's responses were deficient and resorted to facts otherwise available. Pursuant to statute, Commerce may resort to facts otherwise available to complete the record when an interested party fails, for whatever reason, to provide requested information.[1] Before resorting to facts otherwise available, Commerce must notify the respondent of the nature of the deficiency and, to the extent practicable, provide an opportunity for the respondent to remedy or explain the deficiency. 19 U.S.C. § 1677m(d). If the respondent's explanation is unsatisfactory or untimely, Commerce may "disregard all or part of the original and subsequent responses." *Id.* Commerce may not, however, refuse to consider necessary information that satisfies the five criteria outlined in section 1677m(e).

Commerce may further rely on an adverse inference against a respondent when selecting among the facts otherwise available if it concludes that the respondent failed to cooperate to the best of its ability. 19 U.S.C. § 1677e(b). The "best of its ability" standard requires the respondent to put forth its maximum effort to investigate and obtain full and complete answers to Commerce's inquiries. *Nippon Steel*, 337 F.3d at 1382. While this standard does not require perfection on the respondent's part, it does not allow for "inattentiveness, carelessness, or inadequate record keeping." *Id.*

In its preliminary results, Commerce applied an adverse inference against Mukand after concluding that Mukand (i) repeatedly failed to provide product-specific cost data by size; (ii) failed to provide a meaningful explanation of why it could not provide such data; and (iii)failed to provide factual information supporting its claim that

[1] 19 U.S.C. § 1677e(a); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003).

product size did not significantly affect production cost.[2] Commerce noted that requesting product-specific cost data is standard procedure, and that a respondent has a duty to provide a "full explanation and suggested alternative forms" if it is unable to provide requested information. *Id.* Accordingly, Commerce concluded that applying AFA against Mukand was justified.

Mukand responded to the preliminary results and claimed that it materially complied with Commerce's requests. Mukand argued that it could not report size-specific production costs because any information it would generate would not be subject to reasonable verification. At the same time, Mukand offered to submit the same information it previously declared was not reasonably available, and that it could do so "immediately on request." Commerce refused to consider this new information because it lacked time to review and solicit comments on the data within the statutory deadlines. Commerce also noted that Mukand had numerous opportunities during the questionnaire process to provide this data. Commerce further found that Mukand's failure to provide size-specific cost information rendered its response "so incomplete that it could not serve as a reliable basis for reaching a final determination" and could not be used without undue difficulty. Commerce thus continued to apply AFA to all of Mukand's sales under review and assigned Mukand an AFA rate of 21.02 percent ad valorem.[3]

Mukand appealed to the Court of International Trade ("Trade Court"), and the court affirmed Commerce's application of AFA.[4] The Trade Court noted that Commerce asked for size-specific cost information on five separate occasions, and Commerce explained on four of those occasions that it was unsatisfied with Mukand's response and reiterated both the type of information it needed and why it was important. The Trade Court also rejected Mukand's assertion that it complied with Commerce's questionnaires when it explained that it had no reasonable and verifiable way to report size-specific costs. The Trade Court agreed with Commerce that Mukand's responses consisted of vague, unsupported assertions that the requested information was not reasonably available and that size was not a significant cost factor. The Trade Court also noted that, despite these repeated assertions, Mukand was suddenly willing and able to provide the requested information after Commerce issued its preliminary results.

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[2] Stainless Steel Bar from India, 76 Fed. Reg. 12,044, 12,048 (Dep't of Commerce Mar. 4, 2011) (prelim. results).

[3] Stainless Steel Bar from India, 76 Fed. Reg. 56,401, 56,403 (Dep't of Commerce Sept. 13, 2011) (final results).

[4] *Mukand, Ltd. v. United States,* No. 11–00401, 2013 WL 1339399 (Ct. Int'l Trade Mar. 25, 2013).

The Trade Court thus affirmed Commerce's conclusion that Mukand failed to cooperate to the best of its ability.

The Trade Court also rejected Mukand's argument that Commerce should have applied "partial" AFA because Mukand's deficiency did not infect the entire record. The Trade Court noted that the use of partial AFA may be appropriate to fill gaps in a record that otherwise contains usable data and is incomplete with respect to only a discrete category of information.[5] In contrast, Commerce applies total AFA when none of the reported data is reliable or usable because, for example, the data contains pervasive and persistent deficiencies that cut across the entire record. In such situations, Commerce applies an adverse inference to all of the respondent's sales covered by the relevant antidumping duty order.[6]

The Trade Court held that Commerce did not err in applying total AFA against Mukand because Mukand's failure to provide size-specific cost information rendered its responses so incomplete that they could not be used without undue difficulty. Without size-specific cost information, Commerce could not conduct an adequate sales-below-cost test, accurately calculate a difference-in-merchandise adjustment for size, or arrive at an accurate constructed value for any of Mukand's sales. As the Trade Court noted, the absence of information so vital to the antidumping determination rendered Mukand's responses too incomplete for Commerce to calculate a reliable margin. The Trade Court thus affirmed Commerce's application of total AFA.

Mukand appealed the Trade Court's decision to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II

We review decisions of the Trade Court de novo and apply anew the same standard used by the Trade Court.[7] Commerce's antidumping determinations are reviewed for substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is defined as "more than a mere scintilla," as well as evidence that a "reasonable mind might accept as adequate to support a conclusion."[8] Our review is limited to the record before Commerce in the particular review proceeding at issue and includes all evidence that supports or detracts from Com-

[5] *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1347–48 (Fed. Cir. 2011).

[6] *Shandong Huarong Mach. Co. v. United States*, 435 F. Supp. 2d 1261, 1265 n.2 (Ct. Int'l Trade 2006).

[7] *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008).

[8] Consol. Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 229 (1938).

merce's conclusion.[9] An agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence.[10]

A

Mukand argues that Commerce erred in applying AFA because it "fully answered Commerce's specific questions on this issue and so acted to the best of its ability." Appellant Br. 4. According to Mukand, the wording of Commerce's questionnaires suggested that it should submit size-specific cost information only if it could be obtained in a reasonable and verifiable way. We disagree.

Commerce's decision to resort to facts otherwise available and to apply an adverse inference against Mukand is supported by substantial evidence. Mukand's narrow focus on the exact wording of Commerce's questionnaires ignores the main import of Commerce's repeated attempts to obtain size-specific cost information. Commerce requested this information from Mukand on five separate occasions—in the initial questionnaire and in four supplemental questionnaires. In each of the supplemental questionnaires, Commerce explained why it was unsatisfied with Mukand's response and reiterated both the type of information it needed and why it was important. Commerce even went so far as to provide Mukand with a sample chart to complete and encouraged Mukand to reach out if it needed assistance or additional clarification. Commerce further warned Mukand that its continued failure to provide the requested information may force Commerce to resort to facts otherwise available. Commerce was thus justified in resorting to facts otherwise available based on Mukand's repeated failures to provide the requested size-specific cost data.

Commerce's decision to adopt an adverse inference against Mukand is also supported by substantial evidence. Commerce reasonably concluded that Mukand failed to cooperate to the best of its ability when responding to Commerce's requests for information. To avoid the risk of an adverse inference, respondents must take reasonable steps to maintain full and complete records and put forth maximum effort to investigate and obtain all requested information. *Nippon Steel*, 337 F.3d at 1382. Mukand thus had a duty to account for size-specific cost differences in its responses using reasonably available information or explain why such information was not available. As Commerce high-

[9] *Sango Int'l L.P. v. United States*, 567 F.3d 1356, 1362 (Fed. Cir. 2009); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1324–25 (Fed. Cir. 2011) (citing 19 U.S.C. § 1516a(b)(2)(A)).

[10] *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

lighted in its Issues and Decision Memorandum, Mukand failed to provide any of the requested information:

> We provided Mukand with several opportunities to submit factual information to support its claim that cost differences between sizes were insignificant. We requested the weight to length conversion factors, rolling times, and separate conversion cost fields for the rolling and other finishing stages of production in an attempt to analyze the potential significance or insignificance of cost differences due to size. Mukand provided none of the requested data.

J.A. 1815. Product-specific information is a fundamental element in the dumping analysis, and it is standard procedure for Commerce to request product-specific data in antidumping investigations. It was thus reasonable for Commerce to expect from Mukand more accurate and responsive answers to the questionnaire. Relevant here is that Mukand evaded providing a direct response to Commerce's specific questions, and it was not until Mukand responded to the third supplemental questionnaire that it informed Commerce it did not maintain cost accounting records on the basis of product size. Indeed, Mukand was suddenly able to provide the requested information after Commerce published its preliminary results and applied an adverse inference despite repeated claims that the data was not reasonably available.

We agree with Commerce that Mukand's change in position further demonstrated its failure to cooperate to the best of its ability. This circumstance points to why the use of an adverse inference is a useful tool in antidumping determinations. The statement of administrative action on the Uruguay Round Agreements Act ("URAA") provides that the purpose of the adverse inference provision is to encourage future cooperation and ensure that a respondent does not obtain a more favorable antidumping rate by failing to cooperate.[11] Absent the threat of an adverse inference, respondents could sit out the preliminary phase of the investigation and submit requested data only when the resulting preliminary antidumping rates are higher than the rate that would have been established with the withheld data. Hence, we hold that Commerce's decision to apply AFA against Mukand is supported by substantial evidence.

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[11] H.R. Rep. No. 103–316, at 200 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199; *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014). Pursuant to statute, the statement of administrative action is the United States' "authoritative expression" on the interpretation and application of the URAA. 19 U.S.C. § 3512(d).

B

Mukand argues in the alternative that Commerce erred in applying total AFA. According to Mukand, Commerce should have applied partial AFA because it complied with the majority of Commerce's requests for information on U.S. and home market sales and costs. Again, we do not agree.

Commerce's decision to apply total AFA is supported by substantial evidence. Commerce noted that the "requirement to report product-specific sales and cost data is one of the most basic and significant requirements in performing the dumping analysis and margin calculation." J.A. 1808. Hence, Mukand's refusal to break down its cost information by product size prevented Commerce from conducting an adequate sales-below-cost test, accurately calculating a difference-in-merchandise adjustment for size, or arriving at an accurate constructed value for any of Mukand's sales. Commerce thus reasonably concluded that Mukand's submissions were so incomplete that they could not be used without undue difficulty.

Contrary to Mukand's argument, the deficiencies in its responses were not limited to a discrete category of information. As Commerce noted, Mukand assigned the "same amount of conversion costs per kilogram of bar produced, irrespective of the final size of the product produced." J.A. 1604. Mukand thus premised all of its production cost data on the assumption that product size is not a significant cost factor—an assumption it failed to support. In general, use of partial facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty.[12] Without cost data broken down by product size, Commerce was unable to differentiate between different types of steel bar products and could not calculate an accurate constructed value for any of Mukand's products. We therefore hold that Commerce's reliance on total AFA is supported by substantial evidence.

III

For the reasons set forth above, we affirm the decision of the Trade Court.

AFFIRMED

[12] *See Shanghai Taoen Int'l Co. v. United States*, 360 F. Supp. 2d 1339, 1348 n.13 (Ct. Int'l Trade 2005).

PEER BEARING COMPANY - CHANGSHAN, Plaintiff-Appellee, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Appellant.

Appeal No. 2014–1001

Appeal from the United States Court of International Trade in No. 09-CV-0052, Chief Judge Timothy C. Stanceu.

Dated: September 12, 2014

Stephanie Manaker Bell, Stewart and Stewart of Washington, DC, argued for defendant-appellant. With her on the brief were *Terence P. Stewart* and *William A. Fennell.*

Diana Dimitriuc Quaia, Arent Fox LLP, of Washington, DC, argued for plaintiff-appellee. With her on the brief was *John M. Gurley.*

Before NEWMAN, PLAGER, and MOORE, *Circuit Judges.*

MOORE, *Circuit Judge*.

The Timken Company (Timken) appeals from the judgment of the United States Court of International Trade affirming the United States Department of Commerce's (Commerce) calculation of an antidumping duty margin for Peer Bearing Company-Changshan's (CPZ) imports. For the reasons below, we *vacate* and *remand*.

BACKGROUND

This case involves Commerce's administrative review of CPZ's entry of tapered roller bearings that were subject to an Antidumping Duty Order. CPZ imported the bearings by selling them to an unaffiliated U.S. importer. The U.S. importer then sold the bearings to CPZ's U.S. affiliate, Peer Bearing Co. (Peer), which then resold them to unaffiliated U.S. customers.

After instituting review, Commerce issued an initial questionnaire requiring CPZ to identify whether its sales of bearings qualified either as export price (EP) sales or as constructed export price (CEP) sales. This classification determines which price Commerce uses as the U.S. price when calculating CPZ's antidumping duty margin for the bearings. If CPZ's sales are properly classified as EP sales, Commerce uses data reflecting the price of CPZ's sales to its unaffiliated U.S. importer, i.e., the EP data. If CPZ's sales are properly classified as CEP sales, Commerce uses data reflecting the price of Peer's sales to its U.S. customers, i.e., the CEP data. CPZ responded that its sales were properly classified as CEP sales and provided Commerce with the CEP data for its bearing sales. It did not provide the corresponding EP data.

Timken, an intervening domestic bearing producer, submitted comments to Commerce, urging Commerce to require CPZ to also provide the EP data so that Commerce could calculate CPZ's margin on an EP basis. Commerce did not require CPZ to submit the EP data at that time. Instead, in its Preliminary Results, Commerce calculated CPZ's margin on a CEP basis, using the CEP data that CPZ provided. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 41033 (Dep't of Commerce July 17, 2008) (*Preliminary Results*). After Commerce issued the *Preliminary Results*, Timken again submitted comments arguing that the margin should be calculated on an EP basis.

In its Final Results, Commerce changed course and calculated CPZ's margin on an EP basis. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 3987, 3988 (Dep't of Commerce Jan. 22, 2009) (*Final Results*). However, because CPZ had previously provided Commerce with only CEP data, the record contained only limited EP data relating to a small subset of the imported bearings. Commerce used this limited data to estimate the EP prices for each imported product. J.A. 2181. Based on its estimated EP prices, Commerce calculated a margin of 92.84%. *Final Results*, 74 Fed. Reg. at 3989. The Court of International Trade held that Commerce's methods for estimating EP prices in the *Final Results* were contrary to law and remanded. *Peer Bearing Co. - Changshan v. United States*, 752 F. Supp. 2d 1353, 1360–64 (Ct. Int'l Trade 2011) (*Peer I*).

On remand, Commerce reopened the record and twice requested that CPZ provide it with the EP data. CPZ responded that it could not provide the EP data because during the time between Commerce's *Preliminary Results* and *Final Results*, CPZ had been sold and the new owners had not maintained the EP data.[1] In its first redetermination on remand, Commerce held that CPZ had a duty to maintain access to the EP data during the course of the entire proceeding. Final Results of Redetermination Pursuant to Court Remand at 19–20, *Peer Bearing Co. - Changshan v. United States*, No. 09-cv-00052 (Ct. Int'l Trade July 1, 2011), ECF No. 98 (*First Remand Redetermination*). It found that "the issue of [whether EP data or CEP data should be used for] the antidumping duty margin calculation was raised on the record of the underlying administrative review prior to the briefing stage, and again at the briefing stage, before the transfer oc-

[1] As part of the sale, a new entity established by the previous owners assumed responsibility for the antidumping proceedings at issue here.

curred," and continued to be an issue throughout the proceeding. *Id.* at 19. Thus, Commerce concluded, "CPZ should have been aware that at some point [Commerce] might seek this information," and it had a duty to maintain access to it. *Id.* Commerce determined that CPZ's failure to maintain the EP data constituted a "fail[ure] to cooperate to the best of its ability" within the meaning of 19 U.S.C. § 1677e(b), and therefore applied adverse facts available against CPZ to determine the margin. *Id.* at 20–21. It then calculated a 60.95% margin for CPZ. *Id.* at 22.

The Court of International Trade determined that Commerce erred in applying adverse facts available based on CPZ's failure to maintain access to the EP data. *Peer Bearing Co. - Changshan v. United States*, 853 F. Supp. 2d 1365, 1373 (Ct. Int'l Trade 2012) (*Peer II*). It held that 19 U.S.C. § 1677e(b), which allows for the application of adverse facts available if a party fails to act "to the best of its ability to comply with a request for information," does not apply to requests that the party has yet to receive. *Id.* at 1374. It thus found it unreasonable for Commerce to expect CPZ to have preserved the EP data that was requested by Commerce for the first time on remand. *Id.* at 1374–75. The Court of International Trade remanded again for Commerce to "redetermine the U.S. prices of the subject merchandise according to a lawful method." *Id.* at 1378–79.

On the second remand, Commerce again concluded that CPZ's margin should properly be calculated on an EP basis, but that the record did not contain sufficient data for doing so. Final Results of Redetermination Pursuant to Court Remand at 10, *Peer Bearing Co. - Changshan v. United States*, No. 09-cv-00052 (Ct. Int'l Trade Oct. 2, 2012), ECF No. 124 (*Second Remand Redetermination*).Therefore, under protest, Commerce calculated a 6.52% margin using the CEP data, without applying adverse facts available. *Id.* at 10–11. The Court of International Trade affirmed Commerce's *Second Remand Redetermination. Peer Bearing Co. - Changshan v. United States*, No. 09-cv-00052, 2013 WL 4615134 (Ct. Int'l Trade Aug. 30, 2013) (*Peer III*).

Timken appeals. It argues that the Court of International Trade should have affirmed Commerce's application of adverse facts available in its *First Remand Redetermination*. It does not challenge the Court of International Trade's review of Commerce's *Final Results* or of its *Second Remand Redetermination*. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review a decision of the Court of International Trade evaluating an antidumping determination by Commerce by reapplying the statutory standard of review that the Court of International Trade applied in reviewing the administrative record. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002). We will uphold Commerce's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with the law. *Id.*

Commerce may "use an inference that is adverse to the interests of [a] party" (i.e., apply adverse facts available against the party) when it determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). In its *First Remand Redetermination*, Commerce held that § 1677e(b) permitted application of adverse facts available for CPZ's failure to retain information even though that information was not requested by Commerce until a remand from the Court of International Trade required it. *First Remand Redetermination* at 19–20. The Court of International Trade held that this interpretation was incorrect. *Peer II* at 1374. We do not agree.

We have previously considered § 1677e(b)'s "best of its ability" provision. In *Nippon Steel Corp. v. United States*, we held that the "best of its ability" provision "requires that importers . . . take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce." 337 F.3d 1373, 1382 (Fed. Cir. 2003). In *Ta Chen,* we clarified that the information an importer must maintain can include information requested for the first time on remand. 298 F.3d at 1333–34; *see also id.* at 1343 (Gajarsa, J., dissenting) ("This statement implies that Commerce's supplemental questionnaire requested [the CEP] data. That implication is clearly erroneous. The supplemental questionnaire made no such request."); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97–08–01344, 1999 WL 1001194, at *12 (Ct. Int'l Trade Oct. 28, 1999) ("Ta Chen did not provide [CEP data]. [Commerce], however, never specifically requested this information."). In *Ta Chen*, after Commerce's Final Results, the Court of International Trade remanded to obtain previously unrequested CEP data when the respondent had only previously provided EP data. *Ta Chen*, 298 F.3d at 1333–34. On remand, the respondent explained that it was unable to provide the CEP data because its affiliate, which originally possessed the data, had gone

out of business and no longer had the data. *Id.* at 1334. We affirmed Commerce's application of adverse facts available finding that it was reasonable to expect the respondent to preserve its CEP data in the event that Commerce eventually requested it. *Id.* at 1336. We *see* no error in Commerce's interpretation or application of § 1677e(b) in this case, which are consistent with *Ta Chen* and *Nippon Steel*. To comply with "the best of its ability" provision, an importer must maintain access to information so long as that information is the type that a reasonable and responsible importer would have known was required to be maintained. The obligation to maintain its data does not cease at the conclusion of the review, when as in this case, there is an appeal which could cause a need for further proceedings.

We conclude that there is substantial evidence to support Commerce's determination that CPZ did not act to the best of its ability to comply with Commerce's request, even though that request came for the first time on remand. Commerce determined that CPZ should have been aware that Commerce may request the EP data and that CPZ had a responsibility to maintain access to it throughout the course of the proceeding. *First Remand Redetermination* at 19. The Court of International Trade disagreed, holding that "it is not reasonable for Commerce to expect CPZ to have preserved [the EP] data for so long," and that CPZ's failure to do so did not constitute a failure to cooperate. *Peer II* at 1371–75.

We hold that substantial record evidence supports Commerce's finding that CPZ failed to cooperate to the best of its ability by not maintaining access to the EP data throughout the course of the proceeding. The EP data in this case is the type of data that a "reasonable importer should anticipate being called upon to produce." *Nippon Steel*, 337 F.3d at 1382. In each administrative review, Commerce calculates the U.S. price using either EP or CEP data. Commerce's regulations state that it obtains most of its factual information from the interested parties, 19 C.F.R. § 351.301(a), and that Commerce "may request any person to submit factual information at anytime during a proceeding," *id.* § 351.301(c)(2). In this case, CPZ was on notice that its EP data may be necessary; Timken twice argued that EP data and not CEP data should be used to calculate the U.S. price. Commerce has established that a reasonable importer would have been on notice that EP data was relevant to the proceeding and may be requested by Commerce. It is true that Commerce initially calculated the U.S. price using the CEP methodology and that, at that time, Commerce had not yet requested the EP data. However, CPZ knew from Timken's repeated objections that the proper calculation of U.S. price was at issue. When Timken was

objecting, CPZ had access to the EP data but chose not to provide it or maintain it. Thus, we conclude that under these circumstances, where the importer knew there was a dispute over whether to use EP or CEP data, a reasonable importer would know that it needed to maintain both.

We are not persuaded by CPZ's argument that the sale of the company prevented it from acquiring access to the EP data. CPZ knew before the sale that there was an ongoing dispute over whether Commerce should use CEP or EP data. And just over four months after CPZ was sold to its new owners, Commerce issued its *Final Results* which calculated the margin on an EP basis. CPZ thus knew unequivocally that Commerce intended to use EP data, but it did nothing at that time to retrieve or preserve it.

CPZ contends that it took reasonable measures to maintain its access to the EP data after the change of ownership because the purchase agreement gave it access to the data. Appellee's Br. at 38. This is inaccurate. The purchase agreement between CPZ and the new owners does not demonstrate that CPZ acted to the best of its ability to maintain access to the EP data. The agreement only required the new owners to give CPZ access to the records in existence—it did not require the new owners to maintain those records. Ensuring access to records without also ensuring that those records continue to exist does not ensure much of anything.

The issue before us is not whether an importer must maintain access to all sales records from the start of an administrative review until the end. We hold that where, as here, there is a dispute over the proper methodology that Commerce should use to calculate the antidumping duty margin, and the respondent has notice of the dispute at a time when the respondent has access to the data needed to determine the U.S. price according to either methodology, the respondent has a duty to maintain access to the data. Failure to maintain access to the data may, based on the specific facts of the case, result in a determination that the importer has failed to act to the best of its ability in responding to a request for the data and an application of adverse facts available against the importer.

CONCLUSION

Because Commerce's application of adverse facts available in its *First Remand Redetermination* was supported by substantial evidence, we *vacate* the Court of International Trade's decision in *Peer III* and *remand*. On remand, the Court of International Trade should reinstate Commerce's application of adverse facts available and its calculation of CPZ's margin in its *First Remand Redetermination*.

VACATED AND REMANDED