

U.S. Court of International Trade

Slip Op. 15–82

VIET I-MEI FROZEN FOODS CO., LTD., Plaintiff, v. UNITED STATES,
Defendant.

Before: Donald C. Pogue, Senior Judge
Court No. 14–00092

[sustaining Department of Commerce’s final results of reconducted administrative review]

Dated: July 30, 2015

Matthew R. Nicely and *Alexandra B. Hess*, Hughes Hubbard & Reed LLP, of Washington, DC, for the Plaintiff.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Mykhaylo Gryzlov*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Andrew W. Kentz, *Jordan C. Kahn*, and *Nathaniel Maandig Rickard*, Picard Kentz & Rowe LLP, of Washington, DC, for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

OPINION

Pogue, Senior Judge:

In this action, Plaintiff Viet I-Mei Frozen Foods Co., Ltd., successor in interest to Grobest & I-Mei Industrial (Vietnam) Co., Ltd. (hereinafter collectively referred to as “Grobest”), challenges the U.S. Department of Commerce’s (“Commerce”) decision not to terminate a court-ordered re-examination of Grobest in the (reconducted) fourth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam (“Vietnam”), and Commerce’s consequent determination to establish an antidumping duty rate for Grobest using adverse facts available.¹

¹ See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 79 Fed. Reg. 15,309 (Dep’t Commerce Mar. 19, 2014)(final results of re-conducted administrative review of [Grobest] and intent not to revoke; 2008–2009) (“*Reconducted AR4 Final Results*”) and accompanying Issues & Decision Mem., A-552–802, ARP 08–09 (Mar. 13, 2014) (“*Reconducted AR4 Final I & D Mem.*”) cmts. 1 & 2.

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),² and 28 U.S.C. § 1581(c) (2012).

As explained below, because Commerce reasonably determined to continue its re-examination of Grobest, and because the agency properly used adverse facts available, based on the requisite factual findings (which are not contested here), Commerce's final results for this reconducted review with respect to Grobest are affirmed.

BACKGROUND

Grobest is a producer of frozen warmwater shrimp from Vietnam, which is subject to an antidumping duty order.³ In the fourth administrative review of that order, Grobest and the domestic shrimping industry separately requested that Grobest be reviewed.⁴ Commerce initiated the fourth review but, because the review covered 198 companies, the agency exercised its authority, pursuant to 19 U.S.C. §

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

³ Compl., ECF No. 9, at ¶ 6. See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 Fed. Reg. 5,152 (Dep't Commerce Feb. 1, 2005) (amended final determination and antidumping duty order); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 72 Fed. Reg. 52,052, 52,054 (Dep't Commerce Sept. 12, 2007) (final results of the first antidumping duty administrative review and first new shipper review) (reviewing Grobest as a "new shipper" of subject merchandise).

⁴ [Ad Hoc Shrimp Trade Action Comm.] Req. for Admin. Reviews, *Certain Frozen Warmwater Shrimp from [the Socialist Republic of] Vietnam*, A-552-802, ARP 08-09 (Mar. 2, 2009), reproduced in [Conf. & Pub.] App. to Def.-Intervenor Ad Hoc Shrimp Trade Action Comm.'s [Conf. & Pub.] Resp. to Pl.'s USCIT Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 38 & 39 at Tab 4 App. A, at 4; Am. Shrimp Processors Ass'n & La. Shrimp Ass'n's Req. for Admin. Review, *Certain Frozen Warmwater Shrimp from [the Socialist Republic of] Vietnam*, A-552-802, ARP 08-09 (Feb. 27, 2009), reproduced in [Conf. & Pub.] App. to Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 34 ("Def.'s Conf. App.") & 35 ("Def.'s Pub. App.") at Tab 1 Attach. A, at 2; [Grobest's] Req. for Admin. Review, Revocation of Antidumping Duty Order in Part, & Entry of Appearance, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552-802, ARP 08-09 (Feb. 27, 2009), reproduced in Def.'s Conf. & Pub. Apps., ECF Nos. 34-1 & 35-1 at Tab 2, at 2. Cf. 19 U.S.C. § 1675(a)(1)(B) ("At least once during each 12-month period beginning on the anniversary of the date of the publication of . . . an antidumping duty order . . . [Commerce], if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall . . . review, and determine (in accordance with [19 U.S.C. § 1675(a)(2)]) the amount of any antidumping duty."); 19 C.F.R. § 351.213(b)(1) ("Each year during the anniversary month of the publication of an antidumping . . . duty order, a domestic interested party . . . may request in writing that [Commerce] conduct an administrative review under [19 U.S.C. § 1675(a)(1)] of specified individual exporters or producers covered by an order . . ."); *id.* at § 351.213(b)(2) ("During the same month, an exporter or producer covered by an order . . . may request in writing that [Commerce] conduct an administrative review of only that person.").

1677f-1(c)(2)(B),⁵ to limit its individual examination to the two largest Vietnamese exporters/producers of subject merchandise by volume (the “mandatory respondents”).⁶ Although Grobest was not selected as a mandatory respondent, it requested to be individually examined as a “voluntary respondent” pursuant to 19 U.S.C. § 1677m(a).⁷ Commerce denied this request. Accordingly, rather than calculating an antidumping duty rate for Grobest based on an individual examination of Grobest’s own data, Commerce assigned to Grobest the ‘all-others separate rate’⁸ for the period covered by this

⁵ See 19 U.S.C. § 1677f-1(c)(2)(B) (“If it is not practicable to make individual weighted average dumping margin determinations [for each known exporter and producer of the subject merchandise] because of the large number of exporters or producers involved in the . . . review, [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to . . . exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.”).

⁶ Selection of Resp’ts for the 2008–2009 Antidumping Duty Admin. Review, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (June 11, 2009), reproduced in Def.’s Conf. & Pub. Apps., ECF Nos. 34–1 & 35–1 at Tab 4, at 1.

⁷ See [Grobest’s] Voluntary Resp. to [Commerce]’s Section A Questionnaire, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (July 9, 2009), reproduced in Def.’s Conf. & Pub. Apps., ECF Nos. 34–1 & 35–1 at Tab 5, at 2; [Grobest’s] Voluntary Resp. to Section C of [Commerce]’s Questionnaire, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (July 31, 2009), reproduced in Def.’s Conf. & Pub. Apps., ECF Nos. 34–1 & 35–1 at Tab 6, at 1; [Grobest’s] Voluntary Resp. to Section D of [Commerce]’s Questionnaire, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (July 9, 2009), reproduced in Def.’s Conf. & Pub. Apps., ECF Nos. 34–1 & 35–1 at Tab 7, at 1. Section 1677m(a) provides that where, as here, Commerce limits its individual examination pursuant to Section 1677f-1(c)(2), Commerce must, in addition to calculating individual dumping margins for the selected mandatory respondents, also calculate individual dumping margins for any exporters/producers that timely submit the information requested of the mandatory respondents, unless “the number of exporters or producers who have submitted such information is . . . so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the [administrative review].” See 19 U.S.C. § 1677m(a).

⁸ Where (as here) the subject merchandise is exported from a country that Commerce considers to be a non-market economy, the agency generally assigns a single countrywide rate to all exporters of subject merchandise, except those that establish eligibility for a separate rate by demonstrating an absence of government control over their export operations. See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 75 Fed. Reg. 12,206, 12,210 (Dep’t Commerce Mar. 15, 2010)(preliminary results, partial rescission, and request for revocation, in part, of the fourth administrative review) (“In every case conducted by [Commerce] involving Vietnam, Vietnam has been treated as a non-market economy (‘NME’) country. . . . A designation as an NME remains in effect until it is revoked by [Commerce]. Accordingly, there is a rebuttable presumption that all companies within Vietnam are subject to government control and, thus, should be assessed a single antidumping duty rate. It is [Commerce]’s standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in

administrative review.⁹

Grobtest successfully challenged Commerce's decision to deny it an individual dumping margin in this review.¹⁰ At the close of that litigation, this Court held that Commerce's refusal to review Grobtest's voluntary submissions and establish an individual weighted average dumping margin for Grobtest in this review was an abuse of the agency's discretion.¹¹ The court therefore ordered Commerce (*de facto*), with respect to exports."(citations omitted) (unchanged in the final results, 75 Fed. Reg. 47,771 (Dep't Commerce Aug. 9, 2010) (final results and partial rescission of antidumping duty administrative review)("Original AR4 Final Results"). Non-mandatory respondents that qualify for an antidumping duty rate separate from that assigned to the countrywide entity generally receive the 'all-others' rate, calculated in accordance with 19 U.S.C. § 1673d(c)(5). *See id.* at 12,211 ("[T]he statute and [Commerce]'s regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where [Commerce] limited its examination in an administrative review pursuant to [19 U.S.C. § 1677f-1(c)(2)]. [Commerce]'s practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to look to [19 U.S.C. § 1673d(c)(5)], which provides instructions for calculating the all-others rate in an investigation, for guidance."); *id.* (explaining that Commerce did so here) (unchanged in *Original AR4 Final Results*, 75 Fed. Reg. 47,771). Here, Commerce found Grobtest to be eligible for a rate separate from the countrywide entity, and accordingly assigned to Grobtest the all-others separate rate. *Original AR4 Final Results*, 75 Fed. Reg. at 47,773, 47,775.

⁹ *Original AR4 Final Results*, 75 Fed. at 47,773–75.

¹⁰ *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, __ CIT __, 815 F. Supp. 2d 1342, 1360–63 (2012) ("*Grobtest I*"); *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, __ CIT __, 853 F. Supp. 2d 1352, 1362–65 (2012) ("*Grobtest II*").

¹¹ In *Grobtest I*, this Court rejected as unreasonable Commerce's interpretation of the antidumping statute to permit the agency to refuse to consider voluntary submissions in any proceeding in which the agency has limited its individual examination pursuant to 19 U.S.C. § 1677f-1(c)(2). *See Grobtest I*, __ CIT at __, 815 F. Supp. 2d at 1362 ("Commerce argues that when it limits the number of mandatory respondents under § 1677f-1(c)(2), it need not consider any voluntary respondents under § 1677m(a) because it has already determined the number of respondents that it can review (in this case two). But this argument conflates the two statutory provisions and renders § 1677m(a) a dead letter."); *see also id.* at 1363 ("Contrary to Commerce's view that the statute contains a discretionary grant of authority to review voluntary respondents if such review is practical, the statute plainly requires Commerce to conduct individual reviews [of voluntary timely submissions] unless such reviews would be unduly burdensome and inhibit the timely completion of the investigation."). The court therefore remanded for Commerce to "make an independent determination of whether it can review [Grobtest's voluntary submissions] without such review being unduly burdensome and inhibiting the timely completion of the [administrative proceeding]." *Id.* at 1364. On remand, Commerce determined to invoke the 'large number' exception to Section 1677m(a)'s requirement that Commerce establish individual dumping margins for exporters/producers that, like Grobtest, timely submit the information requested of mandatory respondents. *See Grobtest II*, __ CIT at __, 853 F. Supp. 2d at 1362. This 'large number' exception provides that Commerce may decline to review voluntary submissions from the non-mandatory respondents where "the number of exporters or producers who have submitted such information is . . . so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of

merce to individually review Grobest as a voluntary respondent.¹² With Grobest's consent,¹³ the United States requested and was granted entry of final judgment – ordering Commerce to re-conduct its review of Grobest's dumping rate “by individually examining Grobest as a voluntary respondent”¹⁴ – so that this individual examination of Grobest may be “conducted under Commerce’s administrative authority and not under the authority of the Court.”¹⁵

In accordance with this Court’s judgment and order in *Grobest II*, Commerce initiated a proceeding to re-conduct its fourth administrative review of this antidumping duty order with respect to Grobest.¹⁶

the [administrative review].” 19 U.S.C. § 1677m(a)(2). But because Grobest was the sole non-mandatory respondent in this review that timely submitted the information requested of the mandatory respondents, *see Grobest II*, __ CIT at __, 853 F. Supp. 2d at 1363, and because Commerce failed to show that individually reviewing Grobest’s submissions would have been *unduly* burdensome, the court held that Commerce’s refusal to review Grobest’s voluntary submissions and establish an individual weighted average dumping margin for Grobest in this review was an abuse of the agency’s discretion. *Grobest II*, __ CIT at __, 853 F. Supp. 2d at 1364–65 (“When Commerce can show that the burden of reviewing a voluntary respondent would exceed that presented in the typical antidumping or countervailing duty review, the court will not second guess Commerce’s decision on how to allocate its resources. However, Commerce’s failure to make such a showing in this case, thereby rendering § 1677m(a) meaningless, is an abuse of discretion.”) (citing *Grobest I*, __ CIT at __, 815 F. Supp. 2d at 1363; Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.A.A.N. 4040, 4201(“SAA”) (“Commerce . . . will not discourage voluntary responses and will endeavor to investigate all firms that voluntarily provide timely responses in the form required . . .”)); *cf. id.* at 1364 n.12 (detailing the facts asserted by Commerce to support the agency’s determination that individual review of Grobest, the sole potential voluntary respondent, would have been unduly burdensome).

¹² *Grobest II*, __ CIT at __, 853 F. Supp. 2d at 1365.

¹³ *See* Def.’s Mot. for Entry of Final J., Ct. No. 10–00238, ECF No. 123, at 1 (noting all parties’ consent to the motion for entry of final judgment, with the sole exception of “Plaintiff Amanda Foods (Vietnam) Ltd., which [was] not involved [in] the issues relating to Grobest,” who took no position with respect to this motion).

¹⁴ Judgment, Ct. No. 10–00238, ECF No. 124 (“[Commerce] shall re-conduct its administrative review of [Grobest] for the fourth administrative review of the antidumping duty order concerning frozen warmwater shrimp from Vietnam by individually examining Grobest as a voluntary respondent . . .”).

¹⁵ Def.’s Mot. for Entry of Final J., Ct. No. 10–00238, ECF No. 123, at 2; *see id.* (“By ordering Commerce to ‘conduct an individual review of Grobest as a voluntary respondent and to reconsider Grobest’s revocation request in light of the results of that review,’ the Court has granted Grobest the relief it sought. All that is left is for Commerce to conduct an individual examination of Grobest. That review should be conducted under Commerce’s administrative authority and not under the authority of the Court.”) (quoting *Grobest II*, __ CIT at __, 853 F. Supp. 2d at 1365); *id.* at 5 (“[T]he Court has ordered . . . that Commerce individually examine Grobest, which is the relief Grobest sought, and the Government is requesting final judgment to conduct that examination.”).

¹⁶ *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 77 Fed. Reg. 63,786, 63,786 (Dep’t Commerce Oct. 17, 2012) (notice of court decision not in harmony with final results of administrative review, notice of re-conduct of administrative review of

Two months later, however, on December 12, 2012, Grobest submitted to Commerce a letter seeking “to withdraw Grobest’s request for examination as a voluntary respondent in the fourth administrative review of the order on frozen warmwater shrimp from Vietnam,”¹⁷ and asking Commerce to “rescind its October 17, 2012 notice announcing that it would reconduct the 2008–2009 administrative review for Grobest.”¹⁸ Despite having consistently challenged Commerce’s initial denial of Grobest’s request for individual examination, despite having litigated this challenge throughout *Grobest I* and *Grobest II*, and despite having obtained the judgment in *Grobest II* ordering Commerce to reconduct this review and individually examine Grobest,¹⁹ Grobest maintained that “significant management, personnel and accounting changes that have occurred at [Grobest] since the period of review (which dates back to February 2008) [have made it such that] the administrative and legal costs of this examination are greater than the company wishes to incur at this time.”²⁰

[Grobest], and notice of amended final results of administrative review) (“*Reconducted AR4 Initiation*”) (“Pursuant to the Court’s final judgment [in *Grobest II*], [Commerce] will re-conduct the 2008/2009 administrative review of the antidumping duty order on shrimp from Vietnam on Grobest. [Commerce] will conduct the administrative review according to the deadlines listed in [19 U.S.C. § 1675(a)(3)], calculating the deadlines beginning from the date the final judgment was entered, i.e., September 13, 2012.”).

¹⁷ [Grobest’s] Withdrawal of Req. for Voluntary Resp’t Review & Revocation of Antidumping Duty Order in Part, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (Dec. 12, 2012), reproduced in [Conf. & Pub.] App. to Pl.’s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 25 (conf. version) & 26 (pub. version) (“Pl.’s App.”) at Tab 10 Attach. 1 (“*Grobest’s 1st Withdrawal Req.*”) at 1–2.

¹⁸ *Id.* at 2 (citing *Reconducted AR4 Initiation*, 77 Fed. Reg. 63,786).

¹⁹ Judgment, Ct. No. 10–00238, ECF No. 124 (“[I]t is further ordered that [Commerce] shall re-conduct its administrative review of [Grobest] for the fourth administrative review of the antidumping duty order concerning certain frozen warmwater shrimp from Vietnam by individually examining Grobest . . .”).

²⁰ *Grobest’s 1st Withdrawal Req.*, ECF Nos. 25 & 26 at Tab 10 Attach. 1, at 2; see also Pl.’s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 24 (“Pl.’s Br.”) at 17 (“[O]n December 31, 2010, the shrimp processing operation of Grobest & I-Mei was purchased by Viet I-Mei as a result of a break up between the former joint venture partners. [On December 12, 2012 – i.e., nearly two years after this change in ownership, three months after the entry of judgment in *Grobest II*, and two months after Commerce’s initiation of there conducted review of Grobest pursuant to that judgment –] Viet I-Mei sought to withdraw Grobest & I-Mei as a voluntary respondent because Viet I-Mei had undergone ‘significant management, personnel and accounting changes,’ and, accordingly, ‘the administrative and legal costs of th[e] examination [were] greater than the company wishe[d] to incur . . .’ Viet I-Mei was no longer confident of its ability to guarantee the provision of complete and accurate data to Commerce because much of the relevant support documentation would be difficult to obtain due to the change in management and ownership.”) (quoting *Grobest’s 1st Withdrawal Req.*, ECF Nos. 25 & 26 at Tab 10 Attach. 1, at 2 (alterations in Pl.’s Br.)).

The domestic industry opposed Grobest's request to terminate the re-examination.²¹

Commerce declined to abort its re-examination of Grobest, and issued a supplemental questionnaire requiring Grobest to "address[] certain deficiencies"²² discovered in its original questionnaire responses with regard to, *inter alia*, Grobest's reported quantity and value of subject merchandise sold to unaffiliated U.S. customers during the period of review.²³ In the cover letter sent with this supplemental questionnaire, Commerce stated that a response from Grobest was required, in proper format, "no later than close of business

²¹ [Domestic Producers'] Opp'n to Grobest's Req. to Rescind Review, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552-802, ARP 08-09 (Jan. 25, 2013), reproduced in Pl.'s App., ECF Nos. 25 & 26 at Tab 10 Attach. 2 (noting that Petitioners timely requested review of Grobest, and opposing Grobest's request to terminate its individual examination); [Domestic Producers'] Resp. to [Grobest] & Req. for Appl. of Adverse Facts Available, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552-802, ARP 08-09 (Feb. 20, 2013), reproduced in Def.'s Conf. & Pub. Apps., ECF Nos. 34 & 35 at Tab 9 (reiterating Petitioners' opposition to Grobest's withdrawal request, and suggesting that Commerce should employ adverse inferences when selecting from among the facts available to calculate an individualized dumping margin for Grobest in the absence of Grobest's cooperation).

²² Cover Letter to Commerce's Supplemental Questionnaire to Grobest, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552-802, ARP 08-09 (Jan. 15, 2013), reproduced in Def.'s Conf. App., ECF No. 34-2 at Tab 15; Def.'s Supplement to [Pub.] App., ECF No. 45-1 ("*Grobest's Suppl. Quest.*") at 1.

²³ *Id.* at 3 ¶¶ 1-2. Commerce also requested clarification with regard to discrepancies in Grobest's reported "quantity and value of shipments to [Grobest's] affiliated importer . . ." *Id.* at ¶ 1. Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee points out that this importer was also implicated in proceedings involving a separate antidumping duty order on frozen warmwater shrimp from the People's Republic of China, in which Commerce found this importer to have been involved in the provision of misinformation sufficient to impeach the credibility of the (Chinese) exporter/producer at issue in those proceedings. See Def.-Intervenor Ad Hoc Shrimp Trade Action Comm.'s [Conf. & Pub.] Resp. to Pl.'s USCIT Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 36 (conf. version) & 37 (pub. version) ("Def.-Int.'s Br.") at 10-12 (discussing findings made during the sixth administrative review of the antidumping duty order on frozen warmwater shrimp from the People's Republic of China); cf. *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 77 Fed. Reg. 53,856, 53,856 n.2 (Dep't Commerce Sept. 4, 2012) (final results, partial rescission of sixth antidumping duty administrative review and determination not to revoke in part) and accompanying Issues & Decision Mem., A-570-893, ARP 10-11 (Aug. 27, 2012); *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 992 F. Supp. 2d 1285 (2014) (discussing the relevant facts and legal determinations). *But see Reconducted AR4 Final I & D Mem.* cmt. 2 at 7 ("With regard to Domestic Producers' allegation that Grobest's lack of cooperation should be viewed in light of [this context], Domestic Producers referenced the information that is on the record of another proceeding, but did not place it on the record of this review. Therefore, we do not find that this re-conducted administrative review is the correct venue to address this allegation.").

January 29, 2013,”²⁴ and warned that “[u]pon receipt of a response that is incomplete or deficient to the extent that [Commerce] determines it to be non-responsive[,] [Commerce] will not issue additional supplemental questionnaires but will use facts available,” adding that “[i]f [Grobest] fail[s] to cooperate . . . by not acting to the best of [its] ability to comply with [Commerce’s] request for information, [Commerce] may use information that is adverse to [Grobest’s] interest in conducting its analysis.”²⁵

On January 29, 2013 (i.e., the due date set for its response to Commerce’s supplemental questionnaire), Grobest again requested that Commerce terminate the re-examination, without responding to Commerce’s supplemental inquiries.²⁶ Commerce acknowledged and denied Grobest’s request, and again required that Grobest submit responses to Commerce’s supplemental questionnaire, giving the company until close of business on February 13, 2013, to do so.²⁷ But Grobest again refused to respond to Commerce’s inquiries. Instead, on the due date set for its responsive submission, Grobest “reiterate[d] [its] proposal that [Commerce] discontinue examination of Grobest as a voluntary respondent in the fourth administrative review and maintain the Final Results for Grobest as originally issued,”²⁸ again stating only that “the company is unable to continue with the examination of Grobest’s voluntary responses due to the significant management, personnel and accounting changes that have occurred at [Grobest] since the period of review,”²⁹ and that “[t]he administrative and legal costs of this examination are greater than the company wishes to incur at this time.”³⁰

Responding to Grobest’s refusal to cooperate with Commerce’s requests for information, Commerce found that Grobest withheld infor-

²⁴ Cover Letter to *Grobest’s Suppl. Quest.*, ECF No. 34–2 at Tab 15 & ECF No. 45–1, at 1.

²⁵ *Id.* at 2.

²⁶ [Grobest’s] Resp. to Jan. 15, 2013 Supplemental Questionnaire in Re-examination of [Grobest’s] Voluntary Resps., *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (Jan. 29, 2013), reproduced in Pl.’s App., ECF Nos. 25 & 26 at Tab 10 Attach. 3 (“*Grobest’s 2d Withdrawal Req.*”) (noting that Commerce had not explicitly responded to Grobest’s request to terminate the re-examination).

²⁷ Cover Letter to Commerce’s Reissued Supplemental Questionnaire to Grobest, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (Feb. 6, 2013), reproduced in Def.’s Conf. App., ECF No. 34–2 at Tab 16, at 2.

²⁸ [Grobest’s] Resp. to [Commerce’s] Supplemental Questionnaire & Pet’rs’ Objection to Rescission, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (Feb. 13, 2013), reproduced in Pl.’s App., ECF Nos. 25 & 26 at Tab 10 Attach. 4 (“*Grobest’s Resp. to Suppl. Quest.*”) at 4.

²⁹ *Id.* at 2.

³⁰ *Id.*

mation requested of it and impeded the proceeding, within the meaning of 19 U.S.C. §§ 1677e(a)(2)(A) and (C),³¹ and concluded that Grobest failed to cooperate, within the meaning of 19 U.S.C. § 1677e(b),³² by not acting to the best of its ability to comply with Commerce's requests.³³ Accordingly, the agency employed adverse inferences when selecting from among the facts otherwise available to establish Grobest's individual dumping margin for this proceeding.³⁴ Explaining that its practice in this regard is to ensure that the dumping rate established for the non-cooperative respondent is "sufficiently adverse 'as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide [Commerce] with complete and accurate information in a timely manner,'"³⁵ as well as to ensure "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully,"³⁶ Commerce assigned to Grobest a rate of 25.76 percent, which represents "the highest dumping margin on the record of any segment of this proceeding."³⁷ Commerce found that this rate "is appropriate for Grobest

³¹ See 19 U.S.C. §§ 1677e(a)(2)(A) & (C) ("If . . . an interested party or any other person . . . (A) withholds information that has been requested by [Commerce] . . . [or] (C) significantly impedes a proceeding . . . [Commerce] shall, subject to [19 U.S.C. § 1677m(d) (requiring Commerce to "promptly inform the person submitting the response of the nature of the deficiency" and, "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of [the review]"), use the facts otherwise available in reaching the applicable determination").

³² See 19 U.S.C. § 1677e(b) ("If [Commerce] finds 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], [Commerce], in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from – (1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or (4) any other information placed on the record.").

³³ Decision Mem. for Prelim. Results of Re-Conducted Admin. Review, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, ARP 08–09 (Sept. 10, 2013)(adopted in 78 Fed. Reg. 57,352, 57,353 (Dep't Commerce Sept. 18, 2013) (preliminary results of re-conducted administrative review of [Grobest] and intent not to revoke; 2008–2009)(*Reconducted AR4 Prelim. I & D Mem.*) at 7–8 (unchanged in *Reconducted AR4 Final I & D Mem.* cmt. 2 at 6–7).

³⁴ *Id.* (relying on 19 U.S.C. § 1677e(b)).

³⁵ *Id.* at 8 (quoting SAA, H.R. Rep. No. 103–316, vol. 1, at 870).

³⁶ *Id.* at 9 (citing SAA, H.R. Rep. No. 103–316, vol. 1, at 870; *Certain Frozen Canned Warmwater Shrimp from Brazil*, 69 Fed. Reg. 76,910 (Dep't Commerce Dec. 23, 2004) (final determination of sales at less than fair value); *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997)).

³⁷ *Id.* (citation omitted) (unchanged in *Reconducted AR4 Final Results*, 79 Fed. Reg. at 15,310).

in that it is sufficient to ensure that Grobest does not benefit from failing to cooperate in [the reconducted] review by refusing to respond to [Commerce]’s request for complete information regarding its affiliations, sales of subject merchandise, and factors of production.”³⁸

Grobest now challenges Commerce’s decision to deny Grobest’s request to terminate its individual examination as a voluntary respondent and reinstate the final results of the fourth review with respect to Grobest as originally conducted.³⁹ Beyond characterizing its rate as “punitive,” Grobest makes no argument as to the specific rate assigned to it in the reconducted review.⁴⁰ Rather, Grobest contends solely that “Commerce exceeded its statutory authority when it refused to permit [Grobest] to withdraw [its] individual review request,”⁴¹ which “resulted in an impermissibly punitive” rate for Grobest.⁴²

STANDARD OF REVIEW

The court upholds Commerce’s antidumping determinations if they are in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Where, as here, the antidumping statute does not directly address the legal question before the agency, the court will defer to Commerce’s construction of its authority if it is reasonable. *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (relying on *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938), and “can be translated roughly to mean ‘is [the determination] unreasonable?’” *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citation omitted, alteration in the original).

DISCUSSION

Grobest argues that “pursuant to 19 U.S.C. § 1677m and 19 C.F.R. § 351.213(d), Commerce should have withdrawn [Grobest] as a vol-

³⁸ *Id.*

³⁹ Pl.’s Br., ECF No. 24, at 12–22.

⁴⁰ See *id.* at 12–22 (generally addressing all arguments to Commerce’s refusal to permit Grobest’s withdrawal from individual examination and presenting no argument regarding Commerce’s finding that Grobest failed to cooperate, the consequent determination to use adverse facts available, or the specific methodology employed to arrive at the rate ultimately selected for Grobest in the reconducted review).

⁴¹ *Id.* at 22.

⁴² *Id.* at 20.

untary respondent from the review at the request of [Grobest].”⁴³ The Government asserts, first,⁴⁴ that “Grobest’s actions in obtaining the final judgment ordering Commerce to examine it individually estop it from challenging Commerce’s individual examination now,” because it is “well-established that ‘where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.’”⁴⁵ In the alternative, the United States argues that Commerce reasonably interpreted the statute and relevant regulations not to require the agency to terminate Grobest’s court-ordered re-examination based solely upon Grobest’s unilateral decision not to participate in the proceeding,⁴⁶ and contends that on the record presented here, Commerce reasonably determined to proceed with the reexamination and to use adverse facts available when Grobest withheld information and failed to cooperate to the best of its ability.⁴⁷ Each argument is addressed in turn.

I. Judicial Estoppel Is Not Appropriate Here.

Judicial estoppel is “an equitable doctrine invoked by a court at its discretion,”⁴⁸ which is “intended to prevent improper use of judicial machinery.”⁴⁹ Although “the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle,”⁵⁰ several

⁴³ Pl.’s Br., ECF No. 24, at 13.

⁴⁴ Although the Government presents this argument as a secondary, alternative argument to its defense of Commerce’s determination on the merits, the question of estoppel logically precedes the issue of the merits, and so must be addressed first.

⁴⁵ Def.’s Mem. in Opp’n to Pl.’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 33 (“Def.’s Br.”) at 20 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted)); see also *id.* at 23 (“After tying up resources of this Court, the agency, and other interested parties for many months in litigation and obtaining the final judgment that ordered Commerce to examine the company individually, Grobest later unilaterally decided that the exigencies of the moment have changed and that its individual examination is unnecessary. This is the type of reversal that the judicial estoppel doctrine is designed to prevent. Thus, the Court should not countenance Grobest’s maneuvering.”).

⁴⁶ *Id.* at 10–15.

⁴⁷ *Id.* at 18–19.

⁴⁸ *New Hampshire*, 532 U.S. at 750; see also *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1351 (Fed. Cir. 2010) (“NART”) (reviewing this Court’s decision regarding the applicability of judicial estoppel for abuse of discretion) (citing *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996)).

⁴⁹ *New Hampshire*, 532 U.S. at 750 (quotation marks and citations omitted). See also *Data Gen. Corp.*, 78 F.3d at 1565 (“Judicial estoppel is designed to prevent the perversion of the judicial process and, as such, is intended to protect the courts rather than the litigants.”) (citations omitted).

⁵⁰ *New Hampshire*, 532 U.S. at 750 (alternations, quotation marks, and citations omitted).

factors⁵¹ may “typically inform the decision whether to apply the doctrine in a particular case.”⁵² Most importantly, “a party’s later position must be ‘clearly inconsistent’ with its earlier position.”⁵³ In addition, judicial estoppel is appropriate where “the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled,’”⁵⁴ although “it may be appropriate to resist application of judicial estoppel ‘when a party’s prior position was based on inadvertence or mistake.’”⁵⁵

Here, Grobest contends that it sought to withdraw as a voluntary respondent because “on December 31, 2010, the shrimp processing operation of Grobest & I-Mei was purchased by Viet I-Mei,” and “Viet I-Mei was no longer confident of its ability to guarantee the provision of complete and accurate data to Commerce because much of the relevant support documentation would be difficult to obtain due to the change in management and ownership.”⁵⁶ But as Defendant points out,⁵⁷ this change of ownership occurred nearly *two years* prior to the entry of judgment, in favor of Grobest, on its initial request for

⁵¹ Cf. *id.* at 751 (“In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine’s application in specific factual contexts. . . . [W]e simply observe that [these] factors [may] tip the balance of equities in favor of barring [a particular claim].”). See *NART*, 593 F.3d at 1354 (reiterating these *New Hampshire* factors, “which the Supreme Court did not intend to be exclusive,” as informing the court’s “determination of whether a party’s inconsistent legal positions constitute judicial estoppel”).

⁵² *New Hampshire*, 532 U.S. at 750.

⁵³ *Id.* (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999); *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999); *Hossaini v. W. Mo. Med. Ctr.*, 140 F.3d 1140, 1143 (8th Cir. 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (2d Cir. 1997)). A related consideration is “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire*, 532 U.S. at 751 (citations omitted).

⁵⁴ *Id.* (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)); see also *id.* at 750–51 (emphasizing the “risk of inconsistent court determinations” as the relevant “threat to judicial integrity”) (quotation marks and citations omitted).

⁵⁵ *Id.* at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995) and citing *In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989); *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980)); cf. *NART*, 593 F.3d at 1357 (applying judicial estoppel where a party advanced a position inconsistent with its successful prior litigating position, because the party had simply “changed its mind” and “did not argue that [its] original [position] was erroneous, that there were any objective factual changes that justified such a change [in position], or that its ‘prior position was based on inadvertence or mistake.’”) (quoting *New Hampshire*, 532 U.S. at 753).

⁵⁶ Pl.’s Br., ECF No. 24, at 17.

⁵⁷ Def.’s Br., ECF No. 33, at 17.

individual examination.⁵⁸ In that time, Grobest could easily have voluntarily dismissed its litigation in demand of individual examination (thereby obtaining the very result that Grobest now seeks),⁵⁹ but chose not to do so.⁶⁰

Nevertheless, Grobest's earlier position – that Commerce's decision to reject Grobest's request to participate as a voluntary respondent pursuant to 19 U.S.C. § 1677m(a) was not in accordance with law – is not clearly inconsistent with its current position – that Commerce's decision not to terminate the individual examination upon Grobest's subsequent request was also contrary to law. Unlike in *New Hampshire*,⁶¹ acceptance of both of Grobest's positions – i.e., that Commerce erred initially by not granting Grobest voluntary respondent status and then erred again by not terminating Grobest's examination upon the latter's request – would not lead to logically inconsistent court decisions, undermining the integrity of the judicial process.⁶² Put otherwise, the question in *Grobest I* and *Grobest II* was whether Commerce's decision to deny Grobest's voluntary request for individual examination was reasonable on the record presented, whereas the question now before the court concerns the reasonableness of Commerce's separate decision to continue with the examination after Grobest's request to terminate it. Because these are logically discrete issues, and because affirmative answers to both of these questions

⁵⁸ See Judgment, Ct. No. 10–00238, ECF No. 124 (entering final judgment, on September 13, 2012, ordering Commerce to re-conduct the administrative review by individually examining Grobest).

⁵⁹ Cf. *Hubscher Ribbon Corp. v. United States*, __ CIT __, 979 F. Supp. 2d 1360, 1363 (2014) (describing a case in which, in response to Commerce's decision on remand to reopen an investigation and individually examine the plaintiff – a separate-rate respondent who had challenged the separate rate assigned to it – the plaintiff “voluntarily dismissed the litigation rather than be individually reviewed, conceding that all its entries would be covered by the [previously challenged] separate rate”) (citation omitted).

⁶⁰ Nor did any party move for relief from the judgment, which ordered that Commerce “shall re-conduct its administrative review of [Grobest] . . . by individually examining Grobest as a voluntary respondent,” Judgment, Ct. No. 10–00238, ECF No. 124, once it was entered. Cf. USCIT R. 60(b)(6) (“On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any . . . reason that justifies relief.”).

⁶¹ See *New Hampshire*, 532 U.S. at 755 (“Having convinced this Court to accept one interpretation of ‘Middle of the River,’ and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. *Were we to accept New Hampshire's latest view, the risk of inconsistent court determinations would become a reality. We cannot interpret ‘Middle of the River’ in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.*”) (emphasis added; quotation marks and citation omitted).

⁶² Cf. *NART*, 593 F.3d at 1358 (J. Gajarsa, dissenting) (“[J]udicial estoppel no longer serves its purpose when . . . a court faces no risk of reaching an inconsistent determination.”).

would not inherently be mutually exclusive, the doctrine of judicial estoppel, which is applicable solely in cases of manifest contradiction,⁶³ is not appropriate here. Accordingly, the court moves on to the merits of Grobest's challenge.

II. Commerce Was Not Required to Terminate Grobest's Individual Re-Examination Upon Grobest's Request.

As Grobest concedes, “[t]he U.S. antidumping statutory and regulatory framework does not expressly contemplate a voluntary respondent’s rescission of a request for individual review.”⁶⁴ Commerce’s regulations do provide, however, that “[a] voluntary respondent accepted for individual examination . . . will be subject to the same requirements as an exporter or producer initially selected by [Commerce] for individual examination under [19 U.S.C. § 1677f-1(c)(2)], including . . . , where applicable, the use of the facts available under [19 U.S.C. § 1677e] and [19 C.F.R.] § 351.308.”⁶⁵ This regulation subjects voluntary respondents to the same requirements as the mandatory respondents, including specifically to the requirements of Section 1677e – which expressly permits Commerce to resort to adverse inferences in selecting from among the facts otherwise available when the respondent fails to act to the best of its ability to comply with Commerce’s requests for information.⁶⁶ Commerce is therefore correct that voluntary respondents are not entitled to unilaterally dictate their level of participation once accepted for individual examination. As Defendant points out, “[i]f it were otherwise, the voluntary respondent process would be subject to potential manipulation by companies seeking individual review and then declining to proceed if the review started to look unfavorable.”⁶⁷

Nor was Commerce required (as Grobest contends) to discontinue its individual re-examination of Grobest because Grobest’s request to terminate the examination was made within 90 days of the judgment

⁶³ See *New Hampshire*, 532 U.S. at 749 (“[J]udicial estoppel . . . prevents a party from prevailing in one phase of a case on an argument and then relying on a *contradictory* argument to prevail in another phase.”) (emphasis added); *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) (“[A] party [who] assumes a certain position in a legal proceeding, and succeeds in maintaining that position, . . . may not thereafter, simply because his interests have changed, assume a *contrary position*, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”) (emphasis added).

⁶⁴ Pl.’s Br., ECF No. 24, at 15.

⁶⁵ 19 C.F.R. 351.204(d)(2) (2014).

⁶⁶ 19 U.S.C. §§ 1677e(a)-(b).

⁶⁷ Def.’s Br., ECF No. 33, at 12.

order in *Grobtest II*.⁶⁸ Commerce's regulations provide that the agency will rescind an administrative review if the party that requested such review withdraws its request within 90 days of the date of publication of the notice of its initiation (although Commerce may extend this 90-day limit if the agency "decides that it is reasonable to do so").⁶⁹ But, as is clear from its context, this regulatory provision concerns the complete rescission of an administrative review with respect to a particular respondent (where all parties who have requested the review withdraw those requests), rather than the cessation of individual examination for a respondent who prefers the all-others rate.⁷⁰ Here, regardless of Grobest's desire to continue with the review (and regardless of the timing and legal effect of any communication from Grobest to Commerce in this regard), the Petitioners had also requested that Grobest be reviewed and, as this request was never withdrawn, the regulatory provision for rescission is not applicable.⁷¹

At oral argument, counsel for Grobest conceded that 19 C.F.R. § 351.213(d)(1) is addressed to the rescission of reviews and is therefore

⁶⁸ See Pl.'s Br., ECF No. 24, at 16–19 (arguing that Commerce should have treated Grobest's request to terminate the reexamination as a request to rescind individual review under 19 C.F.R. § 351.213(d)(1), calculating that regulation's 90-day deadline from the date of the judgment order in *Grobtest II*).

⁶⁹ 19 C.F.R. § 351.213(d)(1).

⁷⁰ The subsection is entitled "rescission of administrative review" and contains three subparts describing circumstances under which Commerce will "rescind an administrative review" – (1) where the party that requested the review timely withdraws its request; (2) where Commerce had self-initiated the review and decides to discontinue it; and (3) where Commerce concludes that the respondent under review had no shipments of subject merchandise to the United States during the period covered by the review. When viewed together, all three scenarios are addressed to the complete *rescission* of a review with respect to a particular respondent. Moreover, this subsection (addressed to the "rescission of administrative reviews") is situated within a broader section (dealing with the conduct of administrative reviews generally) such that it appears immediately after the subsections concerning the initiation of such reviews, and precedes the subsequent subsections addressed to the actual conduct of these reviews (including a subsequent section addressed specifically to "voluntary respondents," 19 C.F.R. § 351.213(f) (providing that Commerce "will examine voluntary respondents in accordance with [19 U.S.C. § 1677m(a)] and [19 C.F.R.] § 351.204(d)"), again suggesting that this subsection concerns the complete *rescission* of a review of a particular respondent, rather than (as Grobest's argument suggests), the termination of a respondent's individual examination in favor of assigning such respondent the 'all others' rate.

⁷¹ See *Reconducted AR4 Final I & D Mem.* cmt. 1 at 4 ("Even if Grobest properly withdrew its request for review . . . (which it did not), . . . Petitioners requested that [Commerce] review Grobest and did not withdraw their request for review.") (citation to Petitioners' request for review of Grobest omitted); *supra* note 21 (providing citations to the domestic industry's opposition to Grobest's request to termination there-examination). Cf. *Ferro Union, Inc. v. United States*, 23 CIT178, 180–83 (1999) (sustaining Commerce's decision not to rescind review of respondent that withdrew its request within 90 days, because petitioners had not withdrawn their independent request for review of that respondent).

not *directly* applicable. Instead Grobest argued that the court should look to this regulation by way of analogy, and thereby evaluate Commerce’s decision not to terminate Grobest’s individual examination upon Grobest’s request by using the “balancing test” that Grobest contends is generally used to evaluate Commerce’s decisions under 19 C.F.R. § 351.213(d)(1).⁷² But this argument is also unpersuasive. First, the analogy is strained at best. Grobest seeks to apply the rescission regulation to a situation in which it does not seek rescission of its review, but rather would prefer the all-others rate over an individualized rate – an option that is clearly unavailable to the mandatory respondents upon whom the voluntary respondents’ treatment is required to be modelled.⁷³ Next, the “balancing test” to which Grobest refers as a mandatory set of considerations is instead merely part of Commerce’s explanation for *rejecting* proposals to require the agency to rescind under certain conditions. Commerce’s practice does not set out a mandatory balancing test; the agency instead concluded that “the decision to rescind a review will be at [Commerce]’s discretion.”⁷⁴ Finally, even if 19 C.F.R. § 351.213(d)(1) were more perfectly analogous, and even if Grobest were correct that Commerce should have applied a mandatory balancing test that weighed, “[o]n the one hand, the respondent’s request to withdraw, and on the other hand the amount of resources that Commerce has expended at the moment that request is made and the desire to discourage procedural abuses,”⁷⁵ the weight of the evidence here supports the reasonableness of Commerce’s decision. Contrary to Grobest’s contentions, Com-

⁷² See Oral Arg. Tr., ECF No. 50, at 10 (referring to “the preamble to the antidumping regulations”); Pl.’s Br., ECF No. 24, at 16 (citing to *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,317 (Dep’t Commerce May 19, 1997) (final rule) as “the Preamble”); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,317 (responding to commentary on then-proposed § 351.213(d)(1) “and its 90-day limit on withdrawals of a request for review”; rejecting a suggestion that the provision be modified to permit rescission outside the 90-day window, upon withdrawal of the request(s) and in the absence of objections; explaining that Commerce “must have the ability to deny withdrawals of requests for review, even in situations where no party objects” in order to prevent situations such as, “[f]or example,” . . . [where] a party requests a review, [Commerce] devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor”; and concluding that “if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at [Commerce]’s discretion”).

⁷³ 19 C.F.R. § 351.213(f); *id.* at § 351.204(d)(2) (“A voluntary respondent accepted for individual examination . . . will be subject to the same requirements as [the mandatory respondents], including . . . , where applicable, the use of the facts available under [19 U.S.C. § 1677e] and [19 C.F.R.] § 351.308[both of which provide authorization for the use of adverse inference in response to companies’ failure to cooperate.]”).

⁷⁴ See *supra* note 72 (quoting relevant language).

⁷⁵ Oral Arg. Tr., ECF No. 50, at 10.

merce had not merely issued a notice of initiation for the court-ordered reconducted review when Grobest requested to terminate the proceeding. Rather, as is evident from the agency's supplemental questionnaire – which Commerce sent to Grobest shortly after the latter's withdrawal request (keeping the holiday break in mind)⁷⁶ – upon initiating this proceeding Commerce promptly examined Grobest's submissions. Indeed, Commerce found numerous material discrepancies in Grobest's representations with regard to the company's affiliations, the quantity and value of its sales of subject merchandise, and its factors of production.⁷⁷ Thus this is precisely the situation contemplated by the example Commerce provided in *Anti-dumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,317 – on which Grobest now relies in support of its balancing test – where “a party request[ed] a review, [Commerce] devote[d] considerable time and resources to the review, and then the party withdr[ew] its requests once it ascertain[ed] that the results of the review [were] not likely to be in its favor.”

Moreover the issue here, as Grobest concedes, is not whether Commerce should have *rescinded* its review of Grobest, but instead whether Commerce should have permitted Grobest to elect to keep its ‘all-others’ rate rather than cooperate in the individualized re-examination that Commerce initiated pursuant to the judgment order in *Grobest II*.⁷⁸ On this question, Commerce's regulations provide that, as an accepted voluntary respondent, Grobest was subject to the same requirements as the mandatory respondents. Just as “[m]andatory respondents may not dictate their level of participation for the purposes of determining a more favorable separate rate based on another party's data . . . [and therefore] must provide all information that has been requested by [Commerce] and not selectively choose

⁷⁶ See *Grobest's Suppl. Quest.*, ECF No. 45–1 (dated Jan. 15, 2013); *Grobest's 1st Withdrawal Req.*, ECF Nos. 25 & 26 at Tab 10 Attach. 1 (dated Dec. 12, 2012).

⁷⁷ See *Grobest's Suppl. Quest.*, ECF No. 45–1, at 1; *Reconducted AR4 Prelim. I & D Mem.* at 9 (explaining the agency's concern “that Grobest does not benefit from failing to cooperate in [the reconducted] review by refusing to respond to [Commerce]'s request for complete information regarding its affiliations, sales of subject merchandise, and factors of production” (unchanged in *Reconducted AR4 Final Results*, 79 Fed. Reg. at 15,310).

⁷⁸ See, e.g., *Grobest's Resp. to Suppl. Quest.*, ECF Nos. 25 & 26 at Tab 10 Attach. 4, at 2 (“[Grobest] did not request that the fourth administrative review be rescinded for Grobest. We merely requested rescission of the company's full examination as a voluntary respondent. . . . Grobest was already subject to [the fourth review] (based on both Grobest's and Domestic Producers' review requests) and was assigned a separate rate of 3.92%, based on the average of the mandatory respondents' dumping rates . . . [Grobest's] request would not upset this [previously assigned] rate [i.e., Grobest's request would permit the company to elect to keep its predetermined ‘all-others’ rate].”).

which requests to respond to and which information to submit,”⁷⁹ voluntary respondents accepted for individual examination similarly may not refuse to respond to Commerce’s requests for information in order to obtain a more favorable ‘all-others’ rate.

Grobtest argues that, rather than attempting to manipulate the system and obtain a more favorable ‘all-others’ rate, the company realized that, having gone through a messy dissolution of the joint venture that constituted Grobtest at the time that it initially requested to be individually examined, it was no longer able to “carry out a proper verification” and certify to the accuracy of its responses to Commerce’s inquiries, contending that it alerted Commerce to this as soon as the situation became apparent.⁸⁰ But the statute provides a procedure for companies experiencing difficulties with responding to Commerce’s inquiries, which Grobtest neglected to follow. Specifically, “[i]f an interested party, promptly after receiving a request from [Commerce] for information, notifies [Commerce] that such party is unable to submit the information requested in the requested form and manner, *together with a full explanation and suggested alternative forms in which such party is able to submit the information*, [then Commerce] shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.”⁸¹ But rather than providing a full explanation and suggested alternatives, Grobtest simply stated that “the administrative and legal costs of this examination are greater than the company wishes to incur at this time.”⁸² This is not an explanation of any difficulties that Grobtest may have had with submitting the information requested, but rather is a conscious decision not to incur the costs of cooperating with Commerce’s examination.

Thus, for all of the foregoing reasons, Commerce was not *required* by any statutory or regulatory authority to abort its court-ordered

⁷⁹ Issues & Decision Mem., *Wooden Bedroom Furniture from the People’s Republic of China*, A-570–890, ARP 1/12–12/12 (Aug. 25, 2014) (adopted in 79 Fed. Reg. 51,954 (Dep’t Commerce Sept. 2, 2014) (final results of antidumping duty administrative review and new shipper review; 2012)) cmt. 2 at 8.

⁸⁰ See Oral Arg. Tr, ECF No. 50, at 37; see also *id.* at 5–6, 11–12.

⁸¹ 19 U.S.C. 1677m(c)(1) (emphasis added); see also *id.* at 1677m(c)(2) (“[Commerce] shall take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested by [Commerce] in connection with [antidumping administrative] reviews under this subtitle, and shall provide to such interested parties any assistance that is practicable in supplying such information.”).

⁸² *Grobtest’s 1st Withdrawal Req.*, ECF Nos. 25 & 26 at Tab 10 Attach. 1, at 2; *Grobtest’s 2d Withdrawal Req.*, ECF Nos. 25 & 26 at Tab 10 Attach. 3.

individual re-examination of Grobest simply because Grobest changed its mind regarding the benefit of such examination.⁸³ In evaluating Grobest's request to discontinue the re-examination, Commerce emphasized the significant resources that the agency had already expended in connection with Grobest's initial demand for individualized review,⁸⁴ and explained that while "Grobest's principle contention is that it is unwilling to incur the administrative and legal costs associated with participating in the administrative review[,] . . . a company may not impede an antidumping proceeding by refusing to incur administrative and legal costs associated with participating in the proceeding."⁸⁵ Just as the 90-day limitation on withdrawing requests for review aims to "prevent abuse of the procedures for requesting and withdrawing a review . . . [when Commerce] devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor,"⁸⁶ so too the prevention of abuse where Commerce expends resources to initiate an individual examination – and the respondent seeks to withdraw its participation when it changes its mind about the benefit of such examination and prefers the 'all others' rate instead – is a reasonable basis on which Commerce may decline to abort its examination.

Accordingly, because Commerce's determination to continue its re-examination of Grobest notwithstanding Grobest's change of heart

⁸³ The question of whether Commerce *may have* discontinued the examination is not at issue here, see *Reconducted AR4 Final I & D Mem.* cmt. 1 at 5 ("[Commerce] does not find it necessary to address [the Petitioners'] argument [that Commerce does not have authority to terminate the individualized examination of a voluntary respondent once it initiates], because [Commerce] determined not to [abort Grobest's individualized investigation]."), and accordingly no opinion in this regard is expressed herein. See also Def.'s Br., ECF No. 33, at 11 n.5 ("The issue of whether a voluntary respondent may withdraw its request before it has been accepted for individual examination is not presented here."); cf. 19 C.F.R. § 351.204(d) (providing that "[a] voluntary respondent *accepted for individual examination* under [19 U.S.C. § 1677m(a) and 19 C.F.R. § 351.204(d)(1)] will be subject to the same requirements as [mandatory respondents]") (emphasis added). Although Commerce accurately states that it was required by this Court's judgment order in *Grobest II* to conduct the individual re-examination of Grobest, see, e.g., *Reconducted AR4 Final I & D Mem.* cmt. 1 at 5 ("Given the unique circumstances surrounding this review, including the Final Judgment [in *Grobest II*] and the request for review by Petitioners, [Commerce] must conduct the individual examination of Grobest as ordered by the Court."), had Commerce been inclined to accept Grobest's request to discontinue the reexamination, the parties could have moved under USCIT R. 60(b)(6) for relief from the judgment order in *Grobest II*.

⁸⁴ *Reconducted AR4 Prelim. I & D Mem.* at 7.

⁸⁵ *Id.*

⁸⁶ *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,317 (Dep't Commerce May 19, 1997) (final rule)(discussing 19 C.F.R. § 351.213(d)(1)).

was reasonable on the record presented here, it is supported by substantial evidence, and is therefore affirmed.

III. Given Its Uncontested Factual Findings, Commerce Properly Used Adverse Facts Available to Establish Grobest's Antidumping Duty Rate.

Regarding the antidumping duty rate ultimately established for Grobest as a result of Commerce's reexamination, Grobest argues that this rate was "impermissibly punitive."⁸⁷ But Grobest does not challenge the particular findings on which Commerce based this rate.⁸⁸ Specifically, Commerce found that "Grobest withheld requested information, and significantly impeded this proceeding," within the meaning of 19 U.S.C. §§ 1677e(a)(2)(A) and (C),⁸⁹ and that "Grobest has not cooperated to the best of its ability," within the meaning of 19 U.S.C. § 1677e(b).⁹⁰ Given these uncontested findings, Commerce properly resorted to "the facts otherwise available in reaching [its] determination,"⁹¹ and properly "use[d] an inference that is adverse to the interests of [Grobest] in selecting from among the facts otherwise available."⁹² The statute explicitly provides that "[s]uch adverse inference may include reliance on information derived from . . . the petition,"⁹³ and here Commerce selected a rate derived from the petition.⁹⁴ Because a dumping margin based on adverse facts available "is not a punitive measure" when determined in accordance with the requirements of 19 U.S.C. § 1677e,⁹⁵ because Commerce's uncontested findings regarding Grobest's withholding of information and failure to cooperate satisfy Section 1677e's requirements for Commerce's reliance on information derived from the petition, and because, in the absence of a specific challenge, the secondary information relied on appears to have been properly corroborated in

⁸⁷ Pl.'s Br., ECF No. 24, at 20, 22.

⁸⁸ See *id.* 88

⁸⁹ *Reconducted AR4 Final I & D Mem.* cmt. 2 at 6.

⁹⁰ *Id.* at 6–7.

⁹¹ See 19 U.S.C. § 1677e(a).

⁹² See *id.* at § 1677e(b).

⁹³ *Id.* at § 1677e(b)(1).

⁹⁴ *Reconducted AR4 Final I & D Mem.* cmt. 2 at 7 & n.27. Commerce also explained that this rate "is not punitive because it has been corroborated and continues to have probative value." *Id.* (citations to corroboration history omitted). Grobest presents no specific challenge to this analysis. See Pl.'s Br., ECF No. 24, at 20–22.

⁹⁵ *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010).

accordance with 19 U.S.C. § 1677e(c),⁹⁶ the rate established for Grobest as a result of its re-examination in this reconducted review is affirmed.

CONCLUSION

For all of the foregoing reasons, Commerce's final results with respect to Grobest in the reconducted fourth administrative review of this antidumping duty order are affirmed. Judgment will issue accordingly.

Dated: July 30, 2015
New York, NY

/s/ Donald C. Pogue

DONALD C. POGUE, SENIOR JUDGE

⁹⁶ See *Reconducted AR4 Final I & D Mem.* cmt. 2 at 7 & n.29.

