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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2010-2011 Administrative Review on Lightweight Thermal Paper
from Germany

Summary

We have analyzed the comments of the interested parties in the 2010 - 2011 administrative review of the antidumping duty order covering lightweight thermal paper (LWTP) from Germany. As a result of this analysis, we have made no changes to the margin assigned to Papierfabrik August Koehler AG (Koehler). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

Issues

1. Application of Total Adverse Facts Available (AFA)
2. Selection of the AFA Rate

Background

On December 11, 2012, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review of LWTP from Germany. See Lightweight Thermal Paper From Germany; Preliminary Results of Antidumping Duty Administrative Review; 2010 -2011, 77 FR 73615 (December 11, 2012) (Preliminary Results), and accompanying Decision Memorandum entitled "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Lightweight Thermal Paper from Germany" (Preliminary Decision Memorandum). The Preliminary Decision Memorandum, as well as the Memorandum to the File entitled "Lightweight Thermal Paper from Germany: Preliminary Results of Antidumping Duty Administrative Review: Application of Total Adverse Facts Available to Koehler" (AFA Memo), are incorporated herein by reference. The period of review (POR) is November 1, 2010, through October 31, 2011.

We invited parties to comment on the preliminary results. We received comments from the respondent Koehler on January 11, 2013¹ (Koehler Brief), and rebuttal comments from Appleton Papers, Inc. (the petitioner) on January 24, 2013 (Petitioner Rebuttal). On February 13, 2013, the Department held a public hearing at the request of both parties.

Discussion of the Issues

Comment 1: Application of Total AFA

As discussed in the Preliminary Decision Memorandum and in the AFA Memo, based on record evidence, the Department found that Koehler engaged in a transshipment scheme in which Koehler intentionally concealed certain otherwise reportable home market sales transactions from its February 27, 2012, response to sections B and C of the Department's questionnaire (QRBC). This scheme was revealed by the petitioner in a May 18, 2012, letter in which it outlined the information it obtained about the scheme. Koehler confirmed certain business proprietary details of the scheme in its June 27, 2012, supplemental questionnaire response (SQR). In its July 31, 2012, letter to the Department, Koehler publicly acknowledged that the petitioner's allegations were "substantially correct." Under this transshipment scheme, Koehler sold 48-gram thermal paper that it knew was destined for consumption in Germany through various intermediaries in third countries, thereby artificially manipulating prices attributable to those sales of 48-gram thermal paper shipped directly to its German customers. These manipulated prices would affect the calculation of normal value (NV) that would be used to compare Koehler's sales prices to the United States. Koehler also acknowledged that the transshipment scheme began during the period covered by the previous administrative review, *i.e.*, November 1, 2009, through October 31, 2010 (AR2).

As part of the SQR, Koehler provided a new sales listing that included the home market sales it failed to report as required in the QRBC. On July 5, 2012, the Department rejected this new home market sales database on the grounds that it constituted untimely filed new factual information that was unsolicited by the Department. On August 2, 2012, Koehler resubmitted the SQR, without the new database, in accordance with the Department's July 5, 2012, instructions.² Nevertheless, Koehler continued to argue in several submissions prior to the Preliminary Results that the Department should accept the new home market sales database or, at the least, refrain from applying total AFA in this review. See Koehler's August 24, September 7, September 17, September 21, and November 2, 2012, submissions. The petitioner also commented on these topics in its August 16, September 4, and September 19, 2012, submissions.

Because of Koehler's transshipment scheme and its intentional omission of home market sales specifically requested in the Department's questionnaire, we based Koehler's margin in the Preliminary Results on total AFA, in accordance with sections 776(a)(2)(A) - (D) of the Tariff Act of 1930, as amended (the Act), section 776(b) of the Act, and sections 782(d) and (e) of the Act.

¹ Koehler refiled its case brief on January 17, 2013, pursuant to the Department's instructions in the January 16, 2013, Memorandum to the File.

² A public summary of the SQR that complied with the Department's July 5, 2012, instructions was submitted on October 10, 2012.

As detailed in the Preliminary Decision Memorandum and the AFA Memo, the Department applied total AFA to Koehler because Koehler: (A) withheld information requested by the Department; (B) failed to provide such information in a timely manner or in the form or manner requested; (C) significantly impeded this proceeding; and (D) provided information that could not be verified. We stated that application of total AFA rather than partial AFA was warranted because, given the serious and egregious nature of Koehler's conduct, it was not possible to reach any reliable conclusions based on Koehler's data. We also stated that application of facts available with an adverse inference was appropriate because Koehler's actions demonstrated a failure to act to the best of its ability.

Koehler objects to the application of total AFA to its sales in the Preliminary Results. While acknowledging its wrongful behavior, Koehler contends that the Department improperly refused to accept Koehler's revised home market sales data and thus prevented Koehler from remedying what it characterizes as "deficiencies" in its questionnaire response. Specifically, Koehler reiterates its previous submissions and contends that the Department improperly rejected the home market sales database submitted with the SQR, where the Department found such information constituted untimely filed factual information that was not solicited in the Department's May 16, 2012, supplemental questionnaire (SQ), and was submitted after the May 18, 2012, deadline for submitting new factual information.

Koehler maintains that the Department should have accepted the reporting of the additional home market sales because this situation provided the "unique circumstances" under which the Department had first granted Koehler's extension requests, the SQ implicitly requested such information, and such revisions to sales data are normally accepted by the Department in the context of supplemental questionnaire responses. Alternatively, Koehler contends that the Department abused its discretion by refusing to extend the deadline for submitting new factual information in order for Koehler to fully respond to the petitioner's May 18, 2012, allegations and to address the initial deficiencies in the QRBC by correcting the record with accurate and complete information. Koehler argues that, given the factual circumstances surrounding the timing of petitioner's allegations, which made it impossible for Koehler to make a timely and fulsome disclosure, good cause existed for the Department to extend the deadline for submitting new factual information. Koehler complains that the Department has applied a double-standard in this review by accepting new information submitted by the petitioner in a July 9, 2012, filing, but continuing to reject Koehler's revised sales data.

Koehler continues that the Department's refusal to consider the additional home market sales included in its revised sales data base is punitive and thwarts the statutory objective of determining margins as accurately as possible. Koehler also contends that the Department's reasons for refusing to consider Koehler's revised sales data are based on unfair characterizations of Koehler's position or are unexplained entirely.

In addition, Koehler asserts that the Department unlawfully denied it an opportunity to remedy its deficiency under section 782(d) of the Act, and that the reasons stated in the Preliminary Decision Memorandum and AFA Memo for its refusal to consider what Koehler terms its "full disclosure" are incorrect or inadequate. Koehler insists that the Department cannot directly resort to total

AFA regardless of whether the error was a simple mistake or an intentional act unless it first meets the remedial requirements of section 782(d) of the Act, which require the Department to promptly inform the respondent of the nature of the deficiency and, to the extent practicable given the time limits for the completion of the review, provide the party with an opportunity to remedy or explain the deficiency before resorting to any facts otherwise available.

Koehler cites the Court of International Trade (CIT) opinion in Gerber Food (Yunnan) Co., Ltd. v. United States, 491 F. Supp. 2d 1326 (CIT 2007) (Gerber Food) in support of its position that the Department cannot apply AFA if it finds that a respondent's initial questionnaire response is unsatisfactory: "Commerce may not disregard deficient responses without first informing the submitter of the deficiency and, to the extent practicable, providing the submitter the opportunity to remedy or explain the deficiency in light of the statutory time limits for completing the review."³ Rather, Koehler contends, in such situations the courts have interpreted section 782(d) of the Act as requiring the Department to issue a supplemental questionnaire before resorting to AFA.⁴

Thus, Koehler argues that the Department did not fulfill its statutory obligation to issue a supplemental questionnaire solely concerning the deficient data, which would allow Koehler to remedy the existing deficiency. Koehler asserts that, regardless of the reason for the deficiency, the willful intent of a respondent does not invalidate the remedial requirements of section 782(d) of the Act, which is a prerequisite condition before application of total AFA under section 776(b) of the Act can be invoked. According to Koehler, the sole criterion applicable to section 782(d) of the Act is whether sufficient time exists in a proceeding for the Department to request the deficient information and analyze the respondent's response to it.

Finally, Koehler objects to the Department's reference in the Preliminary Decision Memorandum to the home market monthly rebate issue from previous administrative reviews as indicative of "a pattern of home market price manipulation" which, Koehler says, the Department cited as further justification to apply total AFA. Koehler asserts that it is defending its application of this rebate in litigation and the matter should not be confused with the issue of the unreported home market sales in this administrative review.

The petitioner supports the Department's decision in the Preliminary Results to reject Koehler's untimely submissions of its revised home market sales data and to apply an AFA margin to Koehler's U.S. sales. According to the petitioner, the CIT has held that there cannot be

an incentive {for respondents} to submit false information to Commerce in an attempt to lower their margins without the fear of negative consequences... {otherwise} this leaves respondents without any downside to submitting false information in an attempt to lower their margins. If Commerce does not detect the false documents, a lower margin is obtained. If Commerce does

³ Gerber Food, 491 F. Supp. 2d at 1337 (internal citations omitted).

⁴ Koehler's Brief at page 22, citing Ta Chen Stainless Steel Pipe, Inc. v. United States, 23 CIT 804, 819 (1999); NTN Bearing Corp. of Am. V. United States, 132 F. Supp. 2d 1102, 1107, 1108 (CIT 2001), aff'd, 295 F.3d 1263 (CAFC 2002).

detect the falsehood, such conduct is simply removed from consideration while Commerce focuses on all the ways in which the respondents did cooperate.⁵

Thus, the petitioner argues, a respondent should not be allowed to commit fraud in its initial questionnaire response and then have an opportunity to “correct” the fraud without negative consequences if the fraud is detected.

Reiterating its comments in letters it submitted prior to the Preliminary Results, the petitioner rebuffs Koehler’s arguments that the Department authorized Koehler, implicitly or otherwise, to submit the previously-concealed home market sales in the Department’s supplemental questionnaire by granting various extension requests. Specifically, the petitioner asserts that nothing in the Department’s SQ or extension letters can be construed to be an invitation for Koehler to submit these sales data for the record. The petitioner notes that in the SQ, the Department requested Koehler to “explain” and to “identify differences” concerning aspects of Koehler’s questionnaire responses, but the Department did not ask Koehler to revise its sales reporting methodology or include additional sales in the database. Moreover, the petitioner states that the Department did not abuse its discretion by not extending the deadline for Koehler to submit new factual information (*i.e.*, the previously-concealed home market sales) as there was no “good cause” to do so, given that Koehler had the opportunity and obligation to report the omitted sales in its initial questionnaire response, but Koehler itself determined to exclude these sales from its reporting.

The petitioner contrasts the typical situation faced in antidumping duty proceedings, in which a respondent discovers an error in response to a discrepancy identified by the Department, to the instant situation, in which Koehler intentionally submitted a fraudulent questionnaire response and did not disclose the concealed home market sales until Koehler’s deception was revealed by the petitioner. Contrary to Koehler’s assertions that it has been deprived of a full and fair opportunity to amend its initial questionnaire response and report the transshipped sales, the petitioner states that Koehler had a full opportunity to report these sales in its initial questionnaire response, and it was Koehler’s responsibility to provide a complete and accurate sales response within the applicable deadlines.⁶

Moreover, the petitioner contends that the Department was not obligated to accept Koehler’s new sales submission under section 782(d) of the Act, which, as noted in Myland, requires only that the Department allow a party to “remedy or explain the deficiency” (emphasis in the Petitioner’s Rebuttal).⁷ In this instance, the petitioner continues, Koehler had the opportunity to explain the deficiency in the SQR, and the Department found Koehler’s response to be unsatisfactory, in accordance with sections 782(d)(1) and 782(e) of the Act. The petitioner continues that in situations such as this, where a respondent has failed to meet all of the five requirements of section 782(e), *i.e.*, by failing to act to the best of its ability, failing to provide its response within the

⁵ Petitioner Rebuttal at pages 4-5, quoting Tianjin Magnesium International Co. v. United States, 844 F. Supp. 2d 1342, 1348 (CIT 2012) (Tianjin Magnesium).

⁶ In support of this proposition, the petitioner cites Myland Industrial, Ltd. v. United States, 31 CIT 1696, 1704 n.2 (2007) (Myland).

⁷ *Id.* at 1704-05.

applicable time limits, and providing information which could not be verified, the Department is not obligated to permit a remedial response.

Further, the petitioner argues that the application of total AFA was warranted. Even if the Department were to permit the previously-concealed home market sales data to be placed on the record, the petitioner asserts that the application of total AFA is still warranted because, as the Department stated in the Preliminary Decision Memorandum, the actions taken by Koehler “undermine{ } the reliability and credibility of Koehler’s entire set of questionnaire responses.” In support of this position, the petitioner cites another recent CIT decision which stated:

It is reasonable for Commerce to infer that a respondent who admits to having intentionally deceived Commerce officials, and does so only after Commerce itself supplies contradictory evidence, exhibits behavior suggestive of a general willingness and ability to deceive and cover up the deception until exposure becomes absolutely necessary In sum, the inference that a respondent's failure to disclose willful deception until faced with contradictory evidence implicates the reliability of that respondent's remaining representations is reasonable.⁸

The petitioner concludes that, while Gerber Food may appear to support Koehler’s argument for allowing Koehler to remedy its questionnaire response deficiency before applying total AFA, Gerber Food also upheld the application of total AFA based on a respondent’s initial withholding of information and impeding of the review. As the CIT explained in that case:

Commerce may disregard all or part of the original response to the request for information, and the responses to the subsequent requests, if it finds that those responses are not satisfactory, unless the information provided satisfies all of the criteria of § 1677m(e) {section 782(e) of the Act}.... One of those criteria is that the submitter demonstrate that it acted to the best of its ability in providing the requested information. Because of this requirement in § 1677m(e)(4), the court does not construe §1677e(a)(2) and (b); and § 1677m(d) and (e), when read together, to preclude Commerce from invoking the facts otherwise available and adverse inference provisions in all instances in which Commerce, despite initially receiving unsatisfactory responses to its information requests, eventually obtains from an interested party, and verifies, the information it requested in conducting an administrative review under 19 U.S.C. § 1675 (2000) {section 751 of the Act}. If the court were to so construe these related provisions, a participant in the administrative review would incur no adverse consequences for withholding requested information until the later stages of the questionnaire process, or for significantly impeding the review by repeatedly providing questionnaire responses with significant deficiencies, and thereby failing to act to the best of its ability in providing the information requested. The plain meaning of §§ 1677e and 1677m {sections 776 and 782 of the Act} is to the contrary.⁹

Department’s Position:

We affirm the Preliminary Results to apply total AFA to Koehler in this administrative review. As detailed in the Preliminary Decision Memorandum and the AFA Memo, total AFA is warranted because Koehler:

⁸ Petitioner Rebuttal at page 21, quoting Jiangsu Changbao Steel Tube Co., Ltd. v. United States, Ct. No. 10-00180, 2012 CIT LEXIS 159 (CIT Trade November 14, 2012) (Jiangsu Changbao).

⁹ Petitioner Rebuttal at page 24, quoting Gerber Food, 491 F. Supp. 2d at 1336.

(A) withheld information requested by the Department (*i.e.*, Koehler deliberately concealed relevant home market sales in its February 21, 2012, response to section A of the Department's questionnaire (QRA) and the QRBC);

(B) failed to provide such information in a timely manner or in the form or manner requested (*i.e.*, Koehler deliberately excluded home market sales from its submission of the QRA and the QRBC, and did not inform the Department it was unable to submit this information in the requested form or manner within the specified deadline);

(C) significantly impeded this proceeding (*i.e.*, Koehler created and executed a transshipment scheme in order to conceal home market sales from the Department, and provided information about these sales only in response to the petitioner's May 18, 2012, allegations); and

(D) provided information that cannot be verified (*i.e.*, QRA and QRBC were unreliable and unusable because Koehler deliberately submitted incomplete and inaccurate responses and created a transshipment scheme to conceal the omitted home market sales from the Department).

We continue to find that the application of total AFA rather than partial AFA is warranted because, due to Koehler's deliberate scheme to conceal home market sales and manipulate home market price data, as well as Koehler's submission of the QRA and QRBC based on fraudulent data, it is not possible to reach any reliable conclusions based on Koehler's questionnaire responses. Furthermore, application of facts available with an adverse inference is appropriate because Koehler, by its own actions, demonstrated that it failed to act to the best of its ability in providing complete and accurate data.

The Department's authority to make a determination on the basis of the facts available is set forth in section 776(a) of the Act. As in the Preliminary Results, we are making our determination under section 776(a)(2) of the Act, which specifies that at least one of the following criteria be met:

If an interested party or any other person

- (A) withholds information that has been requested by the administering authority or the Commission under this title,
- (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
- (C) significantly impedes a proceeding under this title, or
- (D) provides such information but the information cannot be verified as provided in section 782(i),

the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

Although meeting only one of the criteria under subsections (A) through (D) is sufficient to apply facts available, the Department found in the Preliminary Results that all four criteria were

satisfied. See pages 9-10 of the Preliminary Decision Memorandum and pages 8-10 of the AFA Memo.

The facts upon which the total AFA determination is based are not in dispute. Koehler admitted to the transshipment scheme, which began during AR2, and Koehler admitted to its exclusion of certain reportable 48-gram LWTP sales to Germany from its questionnaire responses in AR2 and this review. Nevertheless, although Koehler admits its role in the transshipment scheme and its concealment of reportable home market sales in AR2 as well as in the QRA and the QRBC submitted in this administrative review, Koehler claims that the Department cannot apply total AFA in this review because, by refusing to accept Koehler's "revised" sales listing, the Department deprived Koehler the opportunity under the statute to remedy its "deficiency" after the Department first brought the "deficiency" to Koehler's attention during this review. Thus, Koehler's objections are not addressed directly by the criteria under section 776(a)(2), but rather the criterion under section 782(d) of the Act, which must be met before the Department may make a determination based on facts available.

As an initial matter, we agree with the petitioner that the SQ and the subsequent letters granting extension deadlines did not include instructions, implicit or otherwise, to submit the data for the home market sales at issue. In the SQ, the Department requested Koehler to "explain" and to "identify differences" concerning aspects of Koehler's questionnaire responses, but the Department did not request Koehler to revise its sales reporting methodology, nor did the Department instruct Koehler to report or include additional sales in the home market database. Moreover, Koehler's extension request did not identify its intent to file a revised home market sales database; rather, Koehler's request was based on its need to investigate and respond to the petitioner's allegations and to provide a complete and accurate response to the SQ. The Department's letter granting the extension due to Koehler's "unique circumstances" was by no means an open invitation for Koehler to submit any and all information beyond the scope of the SQ. We also agree with the petitioner that no "good cause" existed to extend the deadline for submitting new factual information. As we explained in the Preliminary Results, this is not a situation where a respondent inadvertently provided an incomplete response by failing to answer fully or in a timely fashion. Rather than submitting a questionnaire response that was merely deficient, Koehler engaged in an elaborate scheme to conceal certain otherwise reportable home market sales.¹⁰ Moreover, these concealed sales, if reported, could have been matched to Koehler's U.S. sales in the margin calculation. The extent of Koehler's material misrepresentation in this case rendered Koehler's questionnaire responses wholly unreliable and unusable, and in such instances, where a respondent has not acted to the best of its ability, granting Koehler additional time to submit its revised home market sales data would not result in a response in which the Department could rely on the veracity of the data.¹¹

Koehler also complains about an apparent "double-standard" in accepting new factual information in the petitioner's July 9, 2012, submission. We note that Koehler did not raise this concern prior to the submission of the Koehler Brief. However, the petitioner's submission responded to Koehler's SQR, filed on June 27, 2012. As 19 CFR 351.301(c)(1) permits an interested party to

¹⁰ Preliminary Decision Memorandum at page 10.

¹¹ AFA Memo at page 16.

submit factual information “to rebut, clarify, or correct factual information submitted by any other interested party” within 10 days after such factual information is submitted, the petitioner’s information was, after allowing for an intervening weekend, timely.

As we elaborate further below, Koehler had ample opportunity in this proceeding to provide the information it concealed through its own actions, but Koehler failed to do so and must not be permitted now to benefit from its fraudulent conduct. Thus, we determined in the Preliminary Results, and determine again for these final results, that Koehler’s arguments are not supported by section 782(d) of the Act.

Section 782(d) of the Act states that, if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, 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 investigations or reviews under this title. If that person submits further information in response to such deficiency and either (1) the Department finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then the Department may, subject to subsection (e), disregard all or part of the original and subsequent responses.

Following its admission to the transshipment scheme, Koehler has argued – beginning with its submission of the SQR – that it is the Department’s responsibility under section 782(d) of the Act to inform Koehler of the deficiency (*i.e.*, the home market sales “omitted” in the QRBC), and to allow Koehler to remedy the deficiency (*i.e.*, submit the home market sales omitted from the QRBC). Koehler maintains that it has taken “extraordinary steps... to rectify its original omission and demonstrate that it had returned to a state of full cooperation with the Department.”¹² Koehler’s view is that it is the Department that has “blocked” Koehler from submitting the remainder of its home market sales pursuant to section 782(d) of the Act. As a consequence, Koehler claims that the Department cannot invoke the facts available provision of section 776(a)(2). This position, however, overlooks the nature of the so-called deficiency as well as the fact that the Department has indeed complied with the requirements of this statutory provision.

We must emphasize that the “deficiency” at issue did not come about because Koehler inadvertently omitted a number of sales from its questionnaire response as a result of an unintentional oversight in compiling the information. The “deficiency” did not arise due to an unintentional computer programming error that generated an incomplete home market sales database. The “deficiency” did not occur because of a misunderstanding of the Department’s questionnaire instructions. The “deficiency” in Koehler’s questionnaire responses occurred because Koehler intended to submit deficient, incomplete, and fraudulent questionnaire responses to the Department.

Nevertheless, although the deficient questionnaire responses were of Koehler’s own making and it has acknowledged that these responses excluded reportable home market sales, Koehler suggests

¹² Koehler Brief at page 3.

in its post-SQR submissions and in the Koehler Brief that the burden to uncover the “deficiency” and to request its correction falls on the Department. In Koehler’s view, it was not obligated to “correct” its questionnaire responses and report home market sales of the foreign like product unless and until the Department specifically identified the “deficiency.”

This position obscures Koehler’s responsibility, in the first instance, to provide complete and accurate information to the best of its ability. We explained in the AFA Memo that the antidumping questionnaire requested Koehler to provide complete and accurate information, including, but not limited to, its reporting of home market sales. We also stated:

However, despite the Department’s detailed and very specific questionnaire, we find that Koehler intentionally concealed otherwise reportable home market sales transactions, thus, failing to fulfill its statutory obligation to reply accurately and completely to the Department’s request for Koehler’s home market sales, which serve as the essential basis for calculating an accurate normal value (NV) and dumping margin.

As this is Koehler’s third time as a mandatory respondent, the company was fully aware of its statutory duties in this regard. Koehler has previously participated in the less-than-fair-value investigation, administrative review (AR) AR1, AR2, and the instant AR3. Koehler is well aware that the Department examines home market sales in detail and that it requires accurate and reliable responses to all requests for information. In fact, Koehler stated in its June 27 SQR, at 3, that “{a}s Koehler personnel were made aware from the beginning of the antidumping proceedings in 2007, a sale must be reported as a home market sale, even though it is physically shipped to a location outside the home market, if, at the time of sale, the manufacturer knew that the product was ultimately destined for its home market.”¹³

Moreover, Koehler’s submission of the QRA, in which Koehler knowingly understated the quantity and value of its home market sales, and its submission of the QRBC (in which Koehler deliberately excluded from the sales database home market sales that were shipped to a location outside of Germany that, at the time of sale, Koehler knew were destined for the German market) were not the first submissions in which Koehler intentionally submitted inaccurate information to the Department. Koehler had been aware of the deficiency in its own reporting from the time it embarked on the transshipment scheme during AR2.¹⁴ Thus, Koehler’s home market sales reporting in AR2 was incomplete and inaccurate in the same manner as it was in this review. As in this review, Koehler intentionally provided incomplete and inaccurate information in response to the Department’s detailed and very specific AR2 questionnaire. Moreover, Koehler continued to misrepresent its home market sales reporting in response to the Department’s AR2 supplemental questionnaires that included specific questions concerning home market sales. See, e.g., Koehler’s discussion concerning the identification of the proper sales to report as home market sales at pages 23 – 25 of its June 6, 2011, supplemental questionnaire response;¹⁵ Koehler’s responses to questions concerning the identification of German sales and reconciliation of its home market sales database at pages 8 - 10 of its August 17, 2011, supplemental questionnaire

¹³ AFA Memo at page 9.

¹⁴ Koehler’s July 19, 2012, submission at page 2 and fn. 1.

¹⁵ May 18, 2012, submission at Exhibit 15.

response;¹⁶ and Koehler's responses to additional questions concerning the proper identification of home market sales at pages 1 -2 of its September 24, 2011, supplemental questionnaire response.¹⁷

Accordingly, we find Koehler's arguments that the Department "unlawfully denied Koehler an opportunity to remedy its deficiency pursuant to section 782(d) of the Act"¹⁸ to be disingenuous. Koehler did not need the Department to "promptly inform {Koehler} of the nature of the deficiency."¹⁹ As outlined above, Koehler had multiple opportunities, beginning with its response to the AR2 questionnaire, to remedy its fraudulent misreporting of sales. We note that, in this review, Koehler made no attempt to remedy its deliberate deficiency prior to the petitioner's May 18, 2012, letter which revealed the information it had obtained concerning Koehler's transshipment scheme. Not until June 27, 2012, four months after the submission of the QRBC, did Koehler explain to the Department the deficiency caused by its own misreporting.

We agree with the petitioner that the Department fulfilled its obligation under section 782(d) of the Act by providing Koehler with the opportunity to explain its deficiency in the SQR. Section 782(d) does not require the Department to accept a response that belatedly seeks to remedy misreporting. As the CIT clarified,

{n}or do the terms of {section 782(d)} give rise to an obligation for Commerce to permit a remedial response by {the respondent}. Its remedial provisions are not triggered unless the respondent has met all of the five enumerated criteria {under section 782(e)}. Failure to fulfill any one criterion renders § 1677m(d) inapplicable.²⁰

Section 782(d) of the Act also does not require the use of information placed on the record where that information fails to meet the relevant statutory requirements. Section 782(e) provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements if

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information, and
- (5) the information can be used without undue difficulties.

The Department addressed the section 782(e) criteria in the Preliminary Results, concluding that, after analyzing the information concerning Koehler's transshipment scheme,

¹⁶ May 18, 2012, submission at Exhibit 19.

¹⁷ May 18, 2012, submission at Exhibit 23.

¹⁸ Koehler Brief at page 19.

¹⁹ Section 782(d) of the Act.

²⁰ Tung Mung Development Co., Ltd., v. United States, 25 CIT 752, 789 (2001) (emphasis in original); cited in Petitioner Rebuttal at page 19, n.82.

{d}ue to the extent of Koehler's material misrepresentation in this case, we find that Koehler has not acted to the best of its ability. In such instances where a respondent has not acted to the best of its ability, thus, rendering its questionnaire responses unreliable and unusable, we find that the Department is not obligated to issue an additional supplemental questionnaire to allow Koehler to remedy this type of significant and intentional deficiency.²¹

We continue to find that, at a minimum, Koehler has not complied with the requirements of section 782(e) because it failed to act to the best of its ability to provide a complete home market sales database, it failed to provide its response within the applicable time limits, and it provided information which could not be verified. The facts of this case have not changed since the Preliminary Results for us to conclude differently for the final results, nor does any argument offered by Koehler persuade us to reverse this finding. Koehler's belated attempt at "full disclosure" of its transshipment scheme and submission of the omitted home market sales does not demonstrate that Koehler has acted to the best of its ability in providing information for this review. Koehler did not reveal its transshipment scheme voluntarily; it only did so after the petitioner's May 18, 2012, allegation. As discussed above, Koehler failed to respond accurately and completely to the Department's supplemental questionnaire items in AR2 that dealt with the reporting of home market sales. Given this pattern of deception, we believe it unlikely that Koehler would have provided information about the transshipment scheme and the omitted sales were it not for the petitioner's allegation. Therefore, we reject Koehler's argument that it has "returned to a state of full cooperation with the Department."²²

To permit Koehler to submit its "corrected" home market sales database after its fraudulent conduct was revealed by the petitioner would create the situation described in Tianjin Magnesium, discussed above, which would allow respondents to submit misleading responses with impunity. We agree with the petitioner's assessment that

{i}f respondents such as Koehler know that they will get a "free pass" to commit fraud in their initial questionnaire responses, secure in the knowledge that they will have an opportunity to "correct" the fraud should it be discovered, there would be no disincentive with respect to such behavior. Under such a framework, a rational respondent would always take its best shot to lower its margin through deception, concealment, and outright fraud in the initial questionnaire response.²³

Therefore, we continue to find that the requirements of section 782(d) and (e) of the Act have been met in our application of facts available to Koehler's exports during the POR under section 776(a)(2) of the Act.

As a result, and as we explained above, the basis for our Preliminary Results finding to apply facts available under section 776(a)(2) is unchanged and is affirmed in the final results. In the Preliminary Results, we also found that Koehler's failure to cooperate to the best of its ability warranted facts available with adverse inferences under section 776(b) of the Act. This

²¹ AFA Memo at page 11.

²² Koehler Brief at page 4.

²³ Petitioner Rebuttal at page 4.

subsection instructs the Department that if an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the Department, the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

The Department explained at pages 11 and 12 of the Preliminary Decision Memorandum, and pages 13 – 16 of the AFA Memo, that Koehler failed to cooperate to the best of its ability because of its conduct in the transshipment scheme. Specifically, the Department stated:

First, Koehler withheld the requisite information that would have allowed the Department to calculate an accurate dumping margin. Based on Petitioner's allegations and Koehler's acknowledgment of those allegations, we find that Koehler concealed certain otherwise reportable home market sales transactions, thus undermining the credibility and reliability of Koehler's data overall. Second, Koehler failed to provide such information in the manner requested. Moreover, Koehler did not notify the Department that {it} was unable to submit the information requested in the requested form and manner, and within the required time period. Instead, in response to Petitioner's allegations, Koehler attempted to revise its home market sales database. Third, based on this record evidence, we find that Koehler deliberately engaged in a scheme to manipulate its home market prices through its inaccurate reporting of home market sales transactions, thus significantly impeding the Department's ability to conduct the instant review. As a result of Koehler's conduct, the Department finds that it cannot rely upon any of Koehler's submitted information to calculate an accurate dumping margin, due to Koehler's material omission of this essential sales data.²⁴

The Department finds that Koehler has not acted to the best of its ability, absent the transshipped sales that were rejected in Koehler's June 27 SQR. Although Koehler took certain measures after the allegation was made by Petitioner and acknowledged by Koehler, we do not find that such actions taken by Koehler restore our confidence in the reliability of its home market sales data submitted for this review, especially given the extent of the fraudulent activity involved in this transshipment scheme.²⁵

This situation is also unchanged since the Preliminary Results. Accordingly, we continue to apply total AFA to Koehler's exports in the final results. We note that, in the response to the Department's conclusion in the AFA Memo, Koehler refers to its disclosure of its scheme in the SQR and the "remedial actions" it states that it took, and then asks what more it could have done in order to restore the Department's confidence in the reliability of its home market sales data.²⁶ The petitioner suggests that Koehler should not have committed fraud in the first place.²⁷ We agree with the petitioner. The Department cannot tolerate the existence of schemes to evade the antidumping law, such as the one perpetrated by Koehler over two administrative reviews, and must act in order to preserve the integrity of its proceedings. Further, the courts have held that

²⁴ Preliminary Decision Memorandum at page 12.

²⁵ AFA Memo at pages 15-16.

²⁶ Koehler Brief at page 17.

²⁷ Petitioner Rebuttal at page 8.

agencies have the inherent authority to protect the integrity of their proceedings.²⁸ By providing the Department with fraudulent information concerning its home market sales, Koehler did not act to the best of its ability within the meaning of section 776(b) of the Act. Total AFA is warranted not only due to Koehler's misrepresentations in this review, but also to act as a deterrent against future misconduct and attempts to undermine the efficacy of the antidumping law.

We further note that the Department has initiated the next administrative review of the LWTP from Germany antidumping duty order, covering the period of November 1, 2011, through October 31, 2012. Koehler is participating in this review and has the opportunity to demonstrate its full cooperation with the Department by submitting full and complete questionnaire responses without resorting to fraudulent behavior or deception.

With respect to Koehler's complaint that the Department improperly referred to a home market rebate issue from past reviews as part of the Preliminary Results decision to apply AFA, we stress that the Department's final AFA decision is based on the transshipment scheme. While the Department may disagree with Koehler regarding the application of the claimed home market rebates in prior reviews, the rebate issue is not directly relevant to either our decision to apply total AFA to Koehler in this review, nor to our selection of the AFA rate.

Comment 2: Selection of the AFA Rate

In the Preliminary Results, the Department assigned Koehler an AFA rate of 75.36 percent. This rate was the highest margin alleged in the petition. As discussed in the Preliminary Decision Memorandum and the AFA Memo, in order to corroborate this rate, we examined the transaction-specific margins calculated for Koehler during AR2 and found that the 75.36 rate fell within the range of transaction-specific margins calculated for Koehler in AR2. Accordingly, we concluded that the 75.36 percent rate was both reliable and relevant, had probative value, and therefore was corroborated to the extent practicable, in accordance with section 776(b) and (c) of the Act.

Koehler challenges our application of the 75.36 percent rate and our determination that this rate is corroborated to the extent practicable. Koehler claims that the 75.36 percent rate is excessively punitive and a departure from Department practice, as the Department would normally assign as AFA the highest overall margin calculated for any respondent in any segment of the proceeding, or alternatively, an AFA margin that is better grounded in Koehler's commercial reality. Koehler states that the purpose of section 776(b) of the Act "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins."²⁹ While Koehler acknowledges that an AFA margin must include "some built-in increase intended as a deterrent to

²⁸ Tokyo Kikai Seisakusho, Ltd. v. United States, 529 F.3d 1352, 1361-62 (CAFC 2008) ("Commerce possesses inherent authority to protect the integrity of its yearly administrative review decisions, and to reconsider such decisions on proper notice and within a reasonable time after learning of information indicating that the decision may have been tainted by fraud.") (footnote omitted).

²⁹ Koehler Brief at page 27, quoting F.Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (CAFC 2000) (De Cecco).

non-compliance.”³⁰ Koehler asserts that the rate cannot be so far removed from being a “reasonably accurate estimate of the respondent’s actual rate” or based on “reliable facts” with “some grounding in commercial reality” that it becomes “disproportionately punitive in nature.”³¹ Koehler points to a number of court cases that show, according to Koehler, that an AFA margin must be grounded in commercial reality and cannot be disproportionately punitive.³² Further, Koehler asserts that the Department must assign an AFA rate that “must bear a rational relationship to the individual company itself....the holding in Ta Chen³³ requires that an assigned rate relate to the company to which it is assigned.”³⁴ In that regard, Koehler claims that the 75.36 percent rate cannot be used because it is aberrant when compared to Koehler’s commercial practices and in such instances, the Department’s practice is to disregard aberrant margins when assigning AFA rates.³⁵

Koehler also contends that the petition rate is neither reliable nor relevant because it does not withstand corroboration against the margins calculated during the previous segments of the proceeding, and it derives from a constructed value (CV) comparison in the petition, while no previous Koehler transaction-specific margin has ever been calculated based on a CV comparison. Accordingly, Koehler argues that the 75.36 percent rate does not pertain to Koehler's specific experience.

Koehler challenges the Department’s corroboration of the 75.36 percent rate by comparing it to the transaction-specific margins calculated in AR2 because the highest transaction-specific margin of 144.63 percent³⁶ was aberrant as it was based on an extremely low quantity sale. Koehler asserts that its analysis at pages 45 – 47 of the Koehler Brief supports its position that the Department’s corroboration exercise relied on an aberrational margin. Koehler adds that, if the Department does not believe that the small quantity of the transaction at issue is indicative of the sale’s aberrational nature, then the Department should place additional information regarding AR2 sales on the record and allow for further analysis of the AR2 sales for the purpose of determining whether the margin is aberrational.

³⁰ Id.

³¹ Koehler Brief at page 29, quoting Gallant Ocean (Thai.) Co., Ltd. v. United States, 602 F.3d 1319, 1324 (CAFC 2010) (Gallant Ocean).

³² E.g., Gallant Ocean, 602 F.3d 1319; PSC VSMPO-AVISMA Corp. v. United States, 755 F. Supp. 2d 1330, 1338-39 (CIT 2011) (AVISMA); Shandong Huarong General Group Corp. v. United States, 29 CIT 1227, 1232 (2005) (Shandong Huarong); and American Silicon Techs. v. United States, 240 F. Supp. 2d 1306, 1313 (CIT 2002).

³³ Ta Chen Stainless Steel Pipe, Inc. v. United States, 23 CIT 804 (1999).

³⁴ Koehler Brief at page 31, quoting Shandong Huarong, op.cit.

³⁵ E.g., Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India, 71 FR 45012 (August 8, 2006), and accompanying Issues and Decision Memorandum at Comment 15; Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Brazil, 67 FR 62134 (October 3, 2002), and accompanying Issues and Decision Memorandum at Comment 1; and Certain Steel Concrete Reinforcing Bars from Turkey; Final Results of Antidumping Duty Administrative Review, 66 FR 56274 (November 7, 2001), and accompanying Issues and Decision Memorandum at Comment 9.

³⁶ The 144.63 rate was bracketed in the AFA Memo, but Koehler has revealed this rate in the public version of the Koehler Brief.

According to Koehler, to be consistent with the Department's practice and the factors discussed above, the Department should have used as the AFA rate the highest rate calculated for Koehler during the previous segments of this proceeding, namely the 6.50 percent, 3.77 percent, and 4.33 percent rates calculated in the less-than-fair-value (LTFV) investigation and the first two administrative reviews, respectively. Under this methodology, Koehler states that the Department should have selected the LTFV investigation rate of 6.50 percent, which is substantially higher than the subsequent review rates. By contrast, Koehler complains that the 75.36 percent petition rate is so much higher than the calculated rates as to constitute a punishment to Koehler aimed at driving it out of the U.S. market, rather than an incentive to induce future cooperation, as intended by the antidumping statute.

In addition to the 6.50 percent LTFV investigation rate, Koehler proposes additional alternatives to the 75.36 AFA rate. These alternatives range from the 3.77 percent rate from the first administrative review of this proceeding, which Koehler believes has the most probative value because it is closer in time to, and consistent with the commercial practices of the instant review, to a rate calculated using some of the data submitted in the QRBC that results in a rate nominally above the LTFV investigation rate of 6.50 percent. According to Koehler, these proposed rates would meet the statutory requirement for corroboration and also incorporate a deterrent to noncompliance.

The petitioner supports the Department's use of the 75.36 percent rate in the Preliminary Results. The petitioner emphasizes that section 776(b) of the Act permits the use of information from the petition, subject to the requirement under section 776(c) of the Act that, "to the extent practicable," the Department corroborate the information. According to the petitioner, the 75.36 percent rate meets these criteria, as the rate was successfully corroborated against Koehler's own sales data from AR2.

The petitioner asserts that there is nothing in the statute that requires that the petition rate, before it can be used as AFA, be calculated specifically for a certain exporter or using a particular comparison methodology, and thus Koehler's complaint that the petition rate is based on a CV comparison is irrelevant. Regardless of that point, the petitioner notes that the NV used in calculating the 75.36 percent petition rate was based in part on Koehler-specific information,³⁷ and the Department initiated a sales-below cost investigation of Koehler's home market sales in this review so that if margins had been calculated, one or more may have been based on CV.

The petitioner disputes Koehler's characterization of the transaction-specific margins from AR2 used to corroborate the 75.36 percent margin as aberrant. Rather, the petitioner contends that the Department appropriately used the AR2 data to corroborate the rate, consistent with Department practice as upheld by the courts in such cases as PAM, S.p.A. v. United States, 582 F.3d 1336, 1338-1340 (CAFC 2009)(PAM) (upholding corroboration of the highest margin calculated for

³⁷ Notice of Initiation of Antidumping Duty Investigations: Lightweight Thermal Paper from Germany, the Republic of Korea, and the People's Republic of China, 72 FR 62430, 62433 (November 5, 2007) (factory overhead, SG&A, financial expense, and profit components of the COP and CV were calculated from Koehler's financial statements).

respondent Barilla in the first review as the AFA rate for respondent PAM in the sixth review using PAM's own transaction-specific margins from the fourth review) and KYD, Inc. v. United States, 607 F.3d 760, 765-66 (CAFC 2010) (KYD) ("Commerce need not select, as the AFA rate, a rate that represents the typical dumping margin for the industry in question."). The petitioner notes that Koehler offers no evidence to declare the sale underlying the 144.63 percent rate as aberrational other than the low quantity, low net price and high margin associated with the transaction, which is insufficient to render it aberrational,³⁸ and that there is no good cause now to seek the placement of additional AR2 sales information on the record, as Koehler requests, because Koehler has had the opportunity to make this request at more timely points in this review. Moreover, the petitioner notes that Koehler has acknowledged that its transshipment scheme took place during AR2 and thus affected the margins the Department calculated in that review.³⁹ Therefore, the petitioner continues, given the nature of the concealed sales and how they would have impacted the margin, the corroboration analysis without these sales was conservative and therefore relevant to Koehler's commercial experience.

The petitioner also objects to the alternative AFA rates proposed by Koehler, the use of which, the petitioner asserts, would undermine the goal of the AFA provision in the statute to deter non-compliance and induce cooperation, as expressed in the SAA⁴⁰ at 870 and in various Departmental determinations.⁴¹ The petitioner contends that it is not adequate to estimate Koehler's likely margin if it had cooperated from the start of this administrative review. Instead, the petitioner asserts that the AFA rate must include a considerable amount for deterrence against this type of fraud in future proceedings. By contrast, the petitioner asserts that the rates proposed by Koehler are so low as to encourage other respondents to commit fraud.

Department's Position:

We continue to find that the 75.36 percent rate derived from the petition is reliable and relevant, has probative value, and thus is corroborated to the extent practicable in accordance with section 776(b) and (c) of the Act. Accordingly, we affirm the Preliminary Results and continue to apply the 75.36 percent rate to exports of the subject merchandise by Koehler.

Contrary to Koehler's assertion, the Department has followed both the statute and its practice in selecting the 75.36 percent rate from the petition as the AFA rate. In selecting an AFA rate, section 776(b) of the Act states:

Such adverse inference may include reliance on information derived from

- (1) the petition,
- (2) a final determination in the investigation under this title,

³⁸ Avisma, 755 F. Supp. 2d at 1338 and n. 10 (finding that a sale which generated the highest transaction-specific margin by a wide margin was based on a low quantity does not in and by itself make the transaction aberrational).

³⁹ Koehler's July 31, 2012, letter, and Koehler Brief at page 18.

⁴⁰ Statement of Administrative Action. Uruguay Round Agreements Act (URAA), H. Doc. 316, Vol. 1, 103d. Cong. (1994) (SAA).

⁴¹ E.g., Honey From the People's Republic of China: Preliminary Results of Review, 77 FR 46699, 46703 (August 6, 2012).

- (3) any previous review under section 751 or determination under section 753, or
- (4) any other information placed on the record.

The Department's regulations reiterate the statutory provision at 19 CFR 351.308(c).

As stated in the Preliminary Decision Memorandum, our longstanding practice for determining the AFA margin in administrative reviews as well as investigations is to select the higher of: (1) the highest margin stated in the notice of initiation; or (2) the highest margin calculated for any respondent.⁴² This practice ensures that the goal of deterrence to future non-compliance on the part of a respondent is met. Koehler has been the only respondent in the history of this proceeding. Thus, consistent with our well-established practice, and in full accordance with the statute and the regulations, the Department selected the 75.36 percent rate, which was stated in the notice of initiation, because it is higher than the highest margin calculated for Koehler in any segment of this proceeding (*i.e.*, the 6.50 percent rate from the LTFV investigation).

Before using the petition rate, the Department is required to corroborate this secondary information, as stated in section 776(c) of the Act:

Corroboration of Secondary Information. When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

The corroboration requirement is further elaborated at 19 CFR 351.308(d), which states further that:

Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value. The fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.

The sources at our disposal to corroborate the petition margin are limited. Apart from the calculated margins from the previous segments of the proceeding, we have data underlying the calculation of the margin for Koehler in AR2, as placed on the record of this review by the

⁴² See, *e.g.*, Narrow Woven Ribbons With Woven Selvedge From Taiwan: Final Results of Antidumping Duty Administrative Review; 2010-2011, 77 FR 72825, (December 6, 2012), and accompanying Issues and Decision Memorandum at Comment 1 (Ribbons); Certain Lined Paper Products From the People's Republic of China: Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review, 77 FR 61390, 61393 (October 9, 2012); Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 72 FR 37718, 37720 (July 11, 2007), unchanged in Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 64580 (November 16, 2007) (Plastic Bags from Thailand); and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Italy, 67 FR 3155, 3156 (January 23, 2002).

petitioner in its May 18, 2012, submission.⁴³ Our analysis for the Preliminary Results concluded that the 75.36 percent petition rate fell within the range of transaction-specific margins calculated for Koehler in AR2, the highest of which was 144.63 percent.⁴⁴

The margin calculation data from AR2 is relevant for purposes of corroboration because it is Koehler's own data and thus reflective of its commercial practices in regard to this proceeding. We must emphasize that the Department did not choose the 144.63 percent rate (the highest observed transaction-specific margin calculated in AR2) as the AFA rate, but rather cited that rate in order to show that the 75.36 rate was within the range of transaction-specific margins calculated in AR2. Koehler contends that the 144.63 percent rate is aberrational, due to its relatively high amount and the relatively small quantity of the sale to which it pertains, and therefore by extension, the 75.36 percent rate must also be aberrational. However, for the reasons explained below, we find no basis to support Koehler's conclusion.

Koehler acknowledges that the Department's practice is not to consider a transaction-specific margin to be aberrational solely on the basis of the quantity. Nevertheless, Koehler offers no reason to reject this transaction-specific margin used in the corroboration exercise other than its belief that the margin is too high. Koehler claims that it can offer additional reasons if the Department places additional information regarding Koehler's AR2 sales on the record of this review. The petitioner counters, and we agree, that Koehler has had ample opportunity at earlier stages of this review to request that this information be placed on this record. As noted above, Koehler has requested that it be allowed to submit its previously-concealed home market sales at various times prior to the Preliminary Results, yet did not take the same opportunities to request that additional AR2 sales data be placed on this record. Moreover, this record already contains substantial sales data from AR2 as included in the petitioner's May 18, 2012, submission. Koehler relied on this information in order to provide its analysis at page 45 of the Koehler Brief, which utilized all margins calculated in the AR2 final results. Further, as we stated in the Preliminary Results, the Department did not rely on a single margin calculated in AR2 in its corroboration analysis, but rather explained that the petition rate fell within the range of transaction-specific margins calculated in AR2 and included at Exhibit 35 of the May 18, 2012, submission. Koehler raises no concerns that any of the other transactions or transaction-specific margins are aberrational (although it notes that those transaction-specific margins are lower than the 75.36 percent rate used as AFA).

In this case, our corroboration exercise was conservative. That is, we used the AR2 transaction-specific margins to corroborate the petition rate knowing that the underlying home market sales data are incomplete due to Koehler's omission of certain home market sales pursuant to its transshipment scheme, which began during AR2. The specific home market sales Koehler concealed were ones that would have been compared to the U.S. sales made during AR2 and thus, their omission affected the calculation of the NV to which the U.S. sales prices were compared. As the petitioner explains,

⁴³ Appendix I to the Memorandum to the File entitled "Calculation Memorandum for the Final Results – Koehler," dated April 5, 2012; included as Exhibit 35 to the May 18, 2012, submission.

⁴⁴ AFA Memo at page 18.

the impact {of the concealed home market sales} would have been enormous for certain margins at the transaction-specific level. In this regard, we note that Koehler's scheme involved the concealment of its highest-priced sales of the matching 48-gram product. Had those sales been reported during the second review, many more U.S. sales (*i.e.*, those matching to the concealed sales) surely would have had margins exceeding the 75.36% petition rate. Commerce's use in its corroboration analysis of the second review calculations - without the fraudulently omitted transshipped sales - was thus *extremely conservative*.... The fact that Koehler, even after concealing its highest-priced matching sales, still had a second review margin exceeding the 75.36% petition rate is highly significant, and demonstrates that the petition rate is relevant to Koehler's actual experience.⁴⁵

We agree with the petitioner's assessment in general. While we cannot say definitively what the transaction-specific margins would have been had Koehler submitted a full and complete home market sales database in AR2, it is reasonable to assume according to the petitioner's analysis of the available information that the overall margin, and thus the transaction-specific margins, would have been higher. The presumptive purpose of Koehler's transshipment scheme was, after all, to conceal certain home market sales that, if reported, would have led to the calculation of a higher margin. At the least, Koehler has no valid basis to claim that the highest AR2 transaction-specific margin calculated based on Koehler's deficient data is aberrant for purposes of corroborating the petition margin, nor can we find credible Koehler's argument at pages 45 – 47 of the Koehler Brief concerning the quantity of sales with calculated transaction-specific margins below 75.36 percent.

Moreover, the CAFC has previously found that the use of transaction-specific margins to corroborate the petition margin is sufficient, stating that the Department “need not select, as the AFA rate, a rate that represents the typical dumping margin for the industry in question.” See KYD, 607 F.3d at 765-6. In PAM, 582 F.3d at 1340, the CAFC affirmed an AFA rate even though only 0.5 percent of the respondent's total sales were above the selected rate. In Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1339 (CAFC), the CAFC upheld the selected AFA rate even though it was based only on a single sale made by the respondent.

Accordingly, based on our comparison of the 75.36 percent petition rate to Koehler's AR2 sales data (albeit deficient), we find the 75.36 percent rate to be reliable and relevant, and thus to have probative value. Thus, this rate is corroborated to the extent practicable within the meaning of section 776(c) of the Act and 19 CFR 351.308(d).

Furthermore, Koehler objects to the use of the 75.36 percent rate because it is derived from a price-to-CV comparison from the petition, asserting that in prior proceeding segments, the Department has never calculated a price-to-CV transaction-specific margin for Koehler, and thus the comparison is unrepresentative of Koehler's commercial experience. We agree with the petitioner that this argument is irrelevant in determining the AFA rate, as there is nothing in the statute or regulations that requires this type of company-specific analysis in applying an AFA rate, nor has the Department ever disqualified a rate for application to a respondent as an AFA rate solely on the basis of the type of price comparison upon which it is based. We find no precedent to support Koehler's contention that the type of price comparison is a relevant factor in considering

⁴⁵ Petitioner Rebuttal at pages 29-30 (footnotes omitted; emphasis in original).

whether an AFA margin has probative value. Moreover, as the petitioner points out, the CV in the petition relies on Koehler-specific information and, therefore, the 75.36 percent rate reflects at least in part Koehler's own experience. We also note that the Department had initiated a sales-below-COP investigation in this review and accordingly, a margin based on CV would have been entirely possible.

In addition, we disagree with Koehler that the 75.36 percent margin is too high and results in punishment rather than deterrence. The Department's longstanding practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."⁴⁶ The Department's practice also ensures that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.⁴⁷

By definition, a rate based on inferences adverse to Koehler will normally be higher than the other rates in the proceeding which were calculated without an adverse inference, in order to serve as a deterrent to non-compliance. Such an AFA rate may well be uncomfortably high for a respondent, as it appears to be for Koehler in this case, but the high level, in and by itself, does not make the rate punitive. The CAFC has affirmed that "an AFA dumping margin determined in accordance with the statutory requirements is not a punitive measure, and the limitations applicable to punitive damages assessments therefore have no pertinence to duties imposed based on lawfully derived margins such as the margin at issue in this case."⁴⁸ For example, in the administrative review underlying the PAM decision, the Department calculated rates ranging from 0.12 to 7.23 percent;⁴⁹ thus, the AFA margin of 45.49 percent was over six times higher than the highest calculated rate and more than 21 times the average calculated figure. Similarly, in the administrative review underlying KYD, the Department calculated rates ranging from 0.80 to 1.87 percent;⁵⁰ thus, the AFA margin of 122.88 percent was more than 65 times the highest rate calculated for a cooperating company and over 100 times more than the average calculated rate. In each of these cases, the CAFC found that the AFA rates were sufficiently linked to the exporter's commercial reality to deem the rates appropriate.

Finally, Koehler proposes a number of alternative AFA rates, including one which uses data from the QRBC. All of these rates, however, are in single digits and cannot be considered sufficiently adverse to serve as a deterrent to prevent Koehler from submitting fraudulent questionnaire

⁴⁶ E.g., Narrow Woven Ribbons With Woven Selvedge From Taiwan: Preliminary Results of Antidumping Duty Administrative Review, 77 FR 32938, 32940 (June 4, 2012), unchanged in Ribbons; Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10658 (March 9, 2007), unchanged in Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (September 12, 2007); and Certain Steel Concrete Reinforcing Bars from Turkey: Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65084 (November 7, 2006).

⁴⁷ SAA at 870.

⁴⁸ KYD at 768.

⁴⁹ Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 FR 6255, 6257 (February 10, 2004).

⁵⁰ Plastic Bags from Thailand, 72 FR at 64581.

responses in the future. In addition, we cannot consider a rate which relies on data from the instant review, as we have found Koehler's home market sales data to be unreliable and unuseable due to Koehler's fraudulent transshipment scheme, as discussed above under Comment 1. By contrast, the 75.36 percent rate was selected in accordance with the statutory requirements and our longstanding practice with respect to the application of AFA. It is sufficiently adverse to induce Koehler to provide complete and accurate information in a timely manner in the future, which Koehler has the opportunity to do in the 2011-2012 administrative review. Unlike the modest alternative AFA rates proposed by Koehler, the 75.36 percent rate ensures that Koehler does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. Accordingly, we confirm our Preliminary Results to use the 75.36 percent petition rate as the AFA rate for Koehler in this review.

Recommendation:

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of the review and the final dumping margin in the Federal Register.

Agree

Disagree



Paul Piquado
Assistant Secretary
for Import Administration

10 APRIL 2013

(Date)