



A-201-842

POR: 02/01/2016 – 01/31/2017

Public Document
E&C/Office II: RB

DATE: March 12, 2018

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty Administrative Review of Large Residential
Washers from Mexico

I. Summary

We analyzed the comments of the interested parties in the 2016-2017 administrative review of the antidumping duty (AD) order on large residential washers (LRWs) from Mexico. As a result of our analysis, we made no changes to the margin for Electrolux Home Products Corp. N.V. and Electrolux Home Products de Mexico, S.A. de C.V. (collectively, Electrolux), the one producer/exporter subject to this administrative review. 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 review for which we received comments from interested parties:

Comment 1: The Application of Adverse Facts Available (AFA)

Comment 2: Electrolux’s Untimely Filed Responses and Requests

Comment 3: Selection of the AFA Rate

II. Background

On December 18, 2017, the Department of Commerce (Commerce) published in the *Federal Register* the preliminary results of the 2016-2017 administrative review of the AD order on



LRWs from Mexico.¹ The period of review is February 1, 2016, through January 31, 2017. We invited parties to comment on the *Preliminary Results*. In December 2017, we received a timely-filed case brief from Electrolux and a timely-filed rebuttal brief from the petitioner.² Based on our analysis of the comments received, we have not revised the dumping margin for Electrolux from that stated in the *Preliminary Results*.

Commerce exercised its discretion to toll deadlines affected by the closure of the Federal Government from January 20 through 22, 2018. The revised deadline for the final determination of this investigation is now March 12, 2018.³

III. Scope of the Order

The products covered by this order are all large residential washers and certain subassemblies thereof from Mexico.

For purposes of this order, the term “large residential washers” denotes all automatic clothes washing machines, regardless of the orientation of the rotational axis, except as noted below, with a cabinet width (measured from its widest point) of at least 24.5 inches (62.23 cm) and no more than 32.0 inches (81.28 cm).

Also covered are certain subassemblies used in large residential washers, namely: (1) all assembled cabinets designed for use in large residential washers which incorporate, at a minimum: (a) at least three of the six cabinet surfaces; and (b) a bracket; (2) all assembled tubs⁴ designed for use in large residential washers which incorporate, at a minimum: (a) a tub; and (b) a seal; (3) all assembled baskets⁵ designed for use in large residential washers which incorporate, at a minimum: (a) a side wrapper;⁶ (b) a base; and (c) a drive hub;⁷ and (4) any combination of the foregoing subassemblies.

Excluded from the scope are stacked washer-dryers and commercial washers. The term “stacked washer-dryers” denotes distinct washing and drying machines that are built on a unitary frame and share a common console that controls both the washer and the dryer. The term “commercial washer” denotes an automatic clothes washing machine designed for the “pay per use” market meeting either of the following two definitions:

¹ See *Large Residential Washers from Mexico: Preliminary Results of the Antidumping Duty Administrative Review; 2016-2017*, 82 FR 51810 (November 8, 2017) (*Preliminary Results*).

² See Electrolux’s Case Brief, “Large Residential Washers from Mexico—Electrolux Case Brief,” dated December 8, 2017 (Electrolux’s Case Brief); and Petitioner’s Rebuttal Brief, “Large Residential Washers from Mexico: Rebuttal Brief of Whirlpool Corporation,” dated December 13, 2017 (Petitioner’s Rebuttal Brief).

³ See Memorandum for The Record from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, “Deadlines Affected by the Shutdown of the Federal Government,” dated January 23, 2018. All deadlines in this segment of the proceeding have been extended by three days.

⁴ A “tub” is the part of the washer designed to hold water.

⁵ A “basket” (sometimes referred to as a “drum”) is the part of the washer designed to hold clothing or other fabrics.

⁶ A “side wrapper” is the cylindrical part of the basket that actually holds the clothing or other fabrics.

⁷ A “drive hub” is the hub at the center of the base that bears the load from the motor.

(1) (a) it contains payment system electronics;⁸ (b) it is configured with an externally mounted steel frame at least six inches high that is designed to house a coin/token operated payment system (whether or not the actual coin/token operated payment system is installed at the time of importation); (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners;⁹ or

(2) (a) it contains payment system electronics; (b) the payment system electronics are enabled (whether or not the payment acceptance device has been installed at the time of importation) such that, in normal operation,¹⁰ the unit cannot begin a wash cycle without first receiving a signal from a *bona fide* payment acceptance device such as an electronic credit card reader; (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners.

Also excluded from the scope are automatic clothes washing machines with a vertical rotational axis and a rated capacity of less than 3.70 cubic feet, as certified to the U.S. Department of Energy pursuant to 10 CFR § 429.12 and 10 CFR § 429.20, and in accordance with the test procedures established in 10 CFR Part 430.

The products subject to this order are currently classifiable under subheading 8450.20.0090 of the Harmonized Tariff System of the United States (HTSUS). Products subject to this order may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive.

IV. DUTY ABSORPTION

As discussed in the *Preliminary Results*, on February 27, 2017, the petitioner requested that Commerce determine whether antidumping duties have been absorbed by Electrolux during the POR.¹¹ Section 751(a)(4) of the Act provides that, if requested during an administrative review initiated two or four years after the publication of the order, Commerce will determine whether antidumping duties have been absorbed by a foreign producer or exporter, if the subject merchandise is sold in the United States through an affiliated importer. Because this review was

⁸ “Payment system electronics” denotes a circuit board designed to receive signals from a payment acceptance device and to display payment amount, selected settings, and cycle status. Such electronics also capture cycles and payment history and provide for transmission to a reader.

⁹ A “security fastener” is a screw with a non-standard head that requires a non-standard driver. Examples include those with a pin in the center of the head as a “center pin reject” feature to prevent standard Allen wrenches or Torx drivers from working.

¹⁰ “Normal operation” refers to the operating mode(s) available to end users (*i.e.*, not a mode designed for testing or repair by a technician).

¹¹ See *Preliminary Results*, and accompanying Preliminary Decision Memorandum (PDM) at 8-9.

initiated four years after the publication of the order,¹² we are making a duty absorption determination in this segment of the proceeding within the meaning of 19 CFR 351.213(j). As discussed in Comment 1, below, we have determined a margin for Electrolux on the basis of facts available with an adverse inference because Electrolux failed to timely respond to Commerce's AD questionnaire. Similarly, we have applied an adverse inference to find that duty absorption exists on all of U.S. sales of the subject merchandise exported by Electrolux.¹³

V. Discussion of the Issues

Comment 1: The Application of AFA

Electrolux's Brief

- Commerce failed to properly serve the AD questionnaire on Electrolux.¹⁴ Due to Commerce's defective service, Electrolux was unaware that the AD questionnaire had been issued. As a result, Electrolux's ability to participate in the instant review was materially and substantially prejudiced.
- Commerce's statement that it was not required to send special notification to Electrolux because it had legal representation is incorrect.¹⁵ Although Electrolux's counsel requested this administrative review, its review request was not a proxy for an entry of appearance.
- It is Commerce's established practice that, in the event a party has not entered an appearance and does not have counsel, Commerce will: a) mail the questionnaire to the party in question; b) track the questionnaire and verify its delivery; and c) submit a memo to the file documenting this process.¹⁶ Commerce took no such actions in the instant review.
- Service and notice provisions are more than a courtesy to respondents. They exist to provide procedural safeguards to participants in an administrative review, confer regularity and predictability, and afford respondents the opportunity to participate.¹⁷

¹² See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 17188 (April 10, 2017), corrected by *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 21513 (May 9, 2017); and *Large Residential Washers from Mexico and the Republic of Korea: Antidumping Duty Orders*, 78 FR 11148 (February 15, 2013).

¹³ Commerce has made similar findings in other cases where AFA was applied. See, e.g., *Certain Steel Nails from the United Arab Emirates: Preliminary Results of Antidumping Duty Review; 2013-2014*, 80 FR 6693 (February 6, 2015), and accompanying PDM at 9, unchanged in *Certain Steel Nails from the United Arab Emirates: Final Results of Antidumping Administrative Review; 2013-2014*, 80 FR 32527 (June 9, 2015); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 64 FR 35590, 35601 (July 1, 1999); *Extruded Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review*, 63 FR 12752, 12756 (March 16, 1998); and *Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review*, 69 FR 51630, 51631 (August 20, 2004).

¹⁴ See Commerce's Letter re: Request for Information, Antidumping Duty Administrative Review, Electrolux Home Products Corp. N.V., Electrolux Home Products de Mexico, S.A. de C.V., dated April 18, 2017 (AD questionnaire).

¹⁵ See Electrolux's Case Brief at 6 (citing Commerce's Letter, "Large Residential Washers from Mexico: 2016-2017 Administrative Review," dated June 5, 2017).

¹⁶ *Id.* (citing the Enforcement and Compliance Antidumping Manual (AD Manual) at 10-11 of Chapter 4).

¹⁷ *Id.* at 7 (citing *PAM S.p.A. v. United States*, 29 CIT 1194 (CIT 2005), reversed and remanded on other grounds,

- Commerce’s use of AFA as a result of Electrolux’s failure to respond runs counter to *Nippon Steel*.¹⁸ Electrolux did not fail to cooperate to the best of its ability in the instant review.
- Section 776(b) of the Tariff Act of 1930, as amended (the Act), allows Commerce to draw adverse inferences when a party has not acted to the best of its ability in complying with requests for information. However, when Electrolux became aware of Commerce’s issuance of the AD questionnaire, it filed its responses as quickly as possible. In fact, Electrolux submitted its response to sections B through D of the AD questionnaire one week earlier than in the previous year’s administrative review.
- Commerce does not have the discretion to be inflexible with regard to non-statutory deadlines. It abused its discretion in rejecting Electrolux’s response to section A of the AD questionnaire.¹⁹
- In rejecting Electrolux’s submission, which was made 130 days prior to the *Preliminary Results*, Commerce failed to consider whether the interests of fairness and calculating an accurate dumping margin were outweighed by any burden placed on Commerce.²⁰
- The Court of International Trade (CIT) has weighed accuracy and fairness against the burden imposed on Commerce when determining whether Commerce abused its discretion in rejecting information submitted after a deadline.²¹
- But not for then-counsel’s actions in a separate proceeding, Commerce was willing to accept Electrolux’s untimely-filed response in September 2017.²² Therefore, the interests of accuracy and fairness outweigh any burden placed on Commerce.²³

463 F. 3d 1345 (Fed. Cir. 2006) (*PAM S.p.A.*), referenced by *Guangdong Chems. Imp. V. United States*, 30 CIT 85, 95 (CIT 2006) (“[s]ervice of notice provisions generally provide predictability in the administrative review process, and time for respondents to prepare a response”).

¹⁸ *Id.* at 9 (citing *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1383 (Fed. Cir. 2003) (*Nippon Steel*) (“An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; *i.e.*, under circumstances in which it is reasonable to conclude that less than full cooperation has been shown.”)).

¹⁹ *Id.* (citing *Wuhu Fenglian Co., Ltd. V. United States*, 836 F. Supp. 2d 1398, 1403 (CIT 2012) (*Wuhu Fenglian*), quoting *NTN Bearing Corp. v. United States*, 74 F. 3d 1204, 1208 (Fed. Cir. 1995) (*NTN Bearing*); *Artisan Mfrg. Corp. v. United States*, 978 F. Supp. 2d 1334, 1343 (CIT 2014) (*Artisan*) (“while Commerce clearly has the discretion to regulate administrative filings, that discretion is bounded at the outer limits by the obligation to carry out its statutory duty of ‘determin[ing] dumping margins as accurately as possible.’”).

²⁰ *Id.* at 9-10 (citing *Grobest & I-Mei Industrial (Vietnam) Co., Ltd. V. United States*, 815 F. Supp. 2d 1342, 1365 (CIT 2012) (“whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality”); and *Wuhu Fenglian*, 836 F. Supp. 2d at 1404, quoting *NTN Bearing* at 1208 (“preliminary determinations are preliminary precisely because they are subject to change... the tension between finality and correctness simply {does} not exist”)).

²¹ *Id.* at 10 (citing *Usinor Sacilor v. United States*, 872 F. Supp. 1000, 1008 (CIT 1994) (*Usinor Sacilor*)).

²² We note that BakerHostetler no longer represents Electrolux in this proceeding. See Letter from John J. Burke, “Large Residential Washers from Mexico: Withdrawal of Appearance and Certification of Destruction of APO,” dated November 15, 2017.

²³ See Electrolux’s Case Brief at 10 (citing *Usinor Sacilor*, 872 F. Supp. at 1008; *U.S. Magnesium LLC v. United States*, 895 F. Supp 2d 1319, 1325 (CIT 2013) (“In determining whether Commerce’s rejection of an untimely submission amounts to an abuse of discretion, this Court considers whether the interests of accuracy and fairness outweigh the burden placed on {Commerce} and the interest in finality.”); *Wuhu Fenglian*, 836 F. Supp. 2d at 1404-05; *Fine Furniture (Shanghai) Ltd. V. United States*, 865 F. Supp. 2d 1254, 1267 (CIT 2012); and *Dupont Teijin Films v. United States*, 931 F. Supp.2d 1297, 1303-05 (August 21, 2013)).

- Electrolux timely filed its request for an extension of the deadline to submit its responses to sections B through D of the questionnaire. Commerce’s argument that Electrolux’s failure to timely submit its response to section A of the questionnaire rendered the remainder of its response moot has no support in the regulations or statute. Commerce received nearly identical section A data from Electrolux in previous segments of this proceeding and the data necessary for the calculation of a dumping margin was contained in Electrolux’s sections B through D response.
- The application of AFA as a result of an untimely filed submission cannot be automatic.²⁴
- Commerce failed to provide Electrolux with an opportunity to explain or correct its deficiency. Commerce must provide, when practicable, an opportunity to the submitting party to explain or correct the deficiency. Commerce must then determine whether such explanation or correction is either unsatisfactory or untimely.²⁵ These requirements apply to both untimely and incomplete submissions.²⁶ Thus, Commerce committed a legal error in this case, similar to that in *China Kingdom*, for failing to allow Electrolux to remedy the deficiency by submitting its questionnaire responses.²⁷

Petitioner’s Rebuttal Brief

- Electrolux’s claim that Commerce was required to serve the AD questionnaire on it is false. Because Commerce knew that Electrolux was represented by counsel, Commerce followed its normal protocol by releasing the questionnaire on ACCESS. While the AD Manual cannot be cited to establish Commerce’s practice, it provides that questionnaires be mailed in the event that “parties do not have representatives or offices in Washington, DC.”²⁸
- Electrolux was not prejudiced by Commerce’s decision to provide it notice of the questionnaire through ACCESS, because Electrolux knew that the administrative review was underway. Electrolux also knew that it had an obligation to timely file an entry of appearance, which it did in all prior segments of this proceeding. Thus, Electrolux had actual and constructive knowledge of the questionnaire’s issuance, and the U.S. Court of Appeals for the Federal Circuit (CAFC) has repeatedly held that failure to serve a party is harmless under such circumstances.²⁹

²⁴ *Id.* at 11 (citing *China Steel v. United States*, 264 F. Supp. 2d 1339, 1355 (CIT 2003) (“Before resorting to facts available, however, the Department is required to comply with the notice and remedial requirements of Section 1677m(d).”); and section 782(d) of the Act).

²⁵ *Id.* at 12 (citing *Foshan Shunde Yongjian Housewares & Hardware Co. Ltd. v. United States*, Slip Op. 11-123, at 8 (2011)).

²⁶ *Id.* (citing *China Kingdom Import & Export Co., Ltd. v. United States*, 507 F. Supp. 2d 1337, 1352 (CIT 2017) (*China Kingdom*) (“the use of facts otherwise available as a substitute for the untimely submitted information is expressly qualified by Section 1677m(d)”).

²⁷ *Id.* at 13 (citing *China Kingdom*, 507 F. Supp. 2d at 1358).

²⁸ See Petitioner’s Rebuttal Brief at 5 (citing the AD Manual at 1 of Chapter 1 and 11 of Chapter 4).

²⁹ *Id.* at 5 (citing *Suntec Indus. Co. v. United States*, 857 F. 3d 1363, 1369 (CAFC 2017) (*Suntec*); *United States v. Great Am. Ins. Co. of N.Y.*, 738 F. 3d 1320, 1329-30 (Fed. Cir. 2013); *Dixon Ticonderoga Co. v. United States*, 468 F. 3d 1353, 1355-56 (CAFC 2006)); and *Dongtai Peak Honey Indus. v. United States*, 777 F. 3d 1343 (CAFC 2015) (*Dongtai Peak*)).

- In *Suntec*, the CAFC held that because the parties “received constructive and actual notice of the review by publication in the *Federal Register*,” they were not prejudiced by lack of service.³⁰ According to the CAFC, Congress explicitly prescribed the *Federal Register* as the mechanism of notice. In the instant review, Electrolux received actual notice in the *Federal Register*, which both identified Electrolux and stated the requirement that “parties wishing to participate in any of these administrative reviews should... fil{e}... separate letters of appearance...” Electrolux had the responsibility to file an entry of appearance, and acknowledges that, but not for BakerHostetler’s failure to do so, it would have received the questionnaire.³¹
- Electrolux failed to timely provide factual information needed to calculate a dumping margin. As a result, information was missing from the record. Commerce’s application of AFA was, therefore, lawful and appropriate.
- In *Nippon Steel*, the CAFC explained that AFA was appropriate when a respondent missed a deadline. The Court found that the statutory standard of cooperating to the best of one’s ability “does not condone inattentiveness, carelessness, or inadequate record keeping,” but rather “assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken.”³²
- A response to section A of the AD questionnaire, which contains detailed information concerning the respondent company’s operations, affiliated entities, and its overall financial position, is essential to calculating a dumping margin.³³ It is of the same type of information missing in *Dongtai Peak*, a case in which the CAFC affirmed Commerce’s application of AFA.³⁴
- Commerce was not required by law to provide Electrolux with an opportunity to correct its failure to timely file a response to section A of the AD questionnaire. Section 782(d) of the Act concerns responses to requests for information, and instructs Commerce to notify the person submitting a response of any deficiencies. The Act does not impose this requirement upon Commerce in instances in which a party failed to timely file a response, and the courts have never imposed such a requirement.
- On several occasions, Commerce noted that Electrolux’s untimely filed extension requests failed to establish the existence of such extraordinary circumstances.³⁵ Electrolux itself has not challenged Commerce’s finding on this matter, because it cannot make the argument that such extraordinary circumstances existed. Therefore, according

³⁰ *Id.* at 6 (citing *PAM S.p.A.* 463 F. 3d 1345, 1348), and *Suntec* at 1370 (citing *PAM S.p.A.* 463 F. 3d 1349).

³¹ *Id.* (citing Electrolux’s Case Brief at 6).

³² *Id.* at 7 (citing *Nippon Steel*, 337 F.3d at 1382-83); and *Dongtai Peak*, 777 F. 3d 1343 (CAFC 2015) (*Dongtai Peak*)).

³³ *Id.* at 9 (citing *Heavy Forged Hand Tools from the People’s Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 66 FR 48026 (September 17, 2001) (in which Commerce applied AFA for incomplete section A questionnaire responses)).

³⁴ *Id.* at 9.

³⁵ *Id.* at 11 (citing AD Questionnaire; Commerce’s Letter re: Large Residential Washers from Mexico: 2016-2017 Administrative Review, dated May 26, 2017; Commerce’s Letter re: Large Residential Washers from Mexico: 2016-2017 Administrative Review, dated June 5, 2017; Commerce’s Letter re: Large Residential Washers from Mexico: 2016-2017 Administrative Review, dated June 9, 2017; Commerce’s Letter re: Large Residential Washers from Mexico: 2016-2017 Administrative Review, dated June 14, 2017; and Commerce’s Letter re: Large Residential Washers from Mexico: 2016-2017 Administrative Review, dated June 23, 2017).

to Commerce's regulations, Electrolux's untimely filed information must be rejected from the record.

Commerce's Position: Sections 776(a)(1) and (2) of the Act provides that if necessary information is not available on the record or an interested party: (A) withholds information requested by Commerce; (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 of the Act; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, Commerce shall, subject to section 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that, if Commerce determines that a response to a request for information does not comply with the request, then Commerce shall promptly inform the submitter of the nature of the deficiency and shall, to the extent practicable, provide the submitter with an opportunity to remedy or explain the deficiency in light of the time limits for the investigation or review at issue. Further, section 782(c)(1) of the Act states that if an interested party, "promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner," then Commerce shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party. Section 782(e) of the Act states further that Commerce shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (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; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that, 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, Commerce may use an inference adverse to the interests of that party in selecting the facts otherwise available. In applying adverse inferences, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA) explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."³⁶ Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference in selecting from the facts available.³⁷

³⁶ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol 1 (1994) (SAA), at 870; see also *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

³⁷ See, e.g., *Nippon Steel*, 337 F.3d at 1382-83; *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); and *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27295, 27340 (May 19, 1997).

As in the *Preliminary Results*, we continue to find that Electrolux did not act to the best of its ability to comply with Commerce’s request for information. Electrolux requested this fourth administrative review on February 9, 2017,³⁸ fully participated in the three prior segments of this proceeding,³⁹ and was aware of the consequences of its failure to respond within the established deadline.⁴⁰ Nonetheless, Electrolux failed to timely file its response to section A of the AD questionnaire on May 9, 2017, or timely file a request for an extension of the deadline. Electrolux did not request an extension of time to file its section A response until 15 days after the established deadline.⁴¹ Therefore, as discussed further below, we continue to find that Electrolux failed to provide information by the established deadline, significantly impeded the proceeding, and failed to cooperate to the best of its ability in providing the necessary information for Commerce to conduct this administrative review.⁴² Accordingly, for these final results, we continue to find that the application of facts available with an adverse inference, pursuant to sections 776(a)(2)(B)-(C) and 776(b) of the Act, is warranted.⁴³

We disagree with Electrolux that Commerce was required to serve the AD questionnaire on Electrolux. As support for its argument, Electrolux cites the AD Manual, which exists “for the internal training and guidance of Enforcement and Compliance (E&C) personnel only, and... cannot be cited to establish DOC practice.”⁴⁴

However, even assuming *arguendo* that the AD Manual does establish Commerce’s practice, Electrolux has misleadingly combined one AD Manual guideline concerning the entry of appearance with another guideline concerning service. The AD Manual states that, “If the parties do not have representatives or offices in Washington, DC, the analyst will need to mail the questionnaires to them via express mail.”⁴⁵ This is the only condition under which the AD

³⁸ See Electrolux’s Letter, “Large Residential Washers from Mexico: Request for Administrative Review (2/1/16-1/31/17),” dated February 9, 2017.

³⁹ See generally, e.g., *Large Residential Washers from Mexico: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 32169 (July 12, 2017), and accompanying Issues and Decision Memorandum (IDM); *Large Residential Washers from Mexico: Final Results of the Antidumping Duty Administrative Review; 2014-2015*, 81 FR 62714 (September 12, 2016), and accompanying IDM; and *Large Residential Washers from Mexico: Final Results of the Antidumping Duty Administrative Review; 2012-2014*, 80 FR 55335 (September 15, 2015), and accompanying IDM, amended by *Large Residential Washers from Mexico: Amended Final Results of the Antidumping Duty Administrative Review; 2012-2014*, 80 FR 68510 (November 5, 2015).

⁴⁰ See AD Questionnaire Cover Letter, at 3 (“If the Department does not receive either the requested information or a written extension request before 5 p.m. ET on the established deadline, we may conclude that your company has decided not to cooperate in this proceeding . . . {which} may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act.”).

⁴¹ See AD Questionnaire and Electrolux Initial Extension Request.

⁴² See *Hardwood and Decorative Plywood from the People’s Republic of China: Final Affirmative Countervailing Duty Determination; 2011*, 78 FR 58283 (September 23, 2013), and accompanying IDM at 5-6 (applying AFA to the China-wide entity because several respondents that were a part of the China-wide entity did not respond to Commerce’s quantity and value questionnaire).

⁴³ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985, 42986 (July 12, 2000) (where Commerce applied total AFA because the respondent failed to respond to the questionnaire); see also *Nippon Steel*, 337 F.3d at 1382-83.

⁴⁴ See AD Manual at 1 of Chapter 1.

⁴⁵ See AD Manual at 11 of Chapter 4.

Manual provides guidance concerning the mailing of questionnaires. Nowhere in this guidance is the status of a party's entry of appearance discussed. Therefore, per the guidance in AD Manual, there was no reason for Commerce to mail the AD questionnaire to Electrolux. At the time of the issuance of the AD questionnaire, Electrolux had counsel whose office was located in Washington, DC. In the February 9, 2017 review request, BakerHostetler requested a review "on behalf of Electrolux Home Products, Inc., Electrolux Home Products Corp. N.V., and Electrolux Home Products de Mexico, S.A. de C.V. (collectively, Electrolux)." Therefore, because Electrolux was represented by BakerHostetler at the time of the review request, there was no reason for Commerce to mail Electrolux the AD questionnaire.

Electrolux cites *Nippon Steel* as support for its argument that there was no reasonable basis for Commerce to conclude that it was uncooperative in the instant review.⁴⁶ However, Electrolux clearly failed to cooperate to the best of its ability to comply with Commerce's requests for information. Electrolux's counsel did not file an entry of appearance until May 3, 2017, which was 23 days after the publication of the initiation of this review in the *Federal Register* on April 10, 2017.⁴⁷ Counsel also evidently failed to examine the record of this proceeding at the time of his entry of appearance; otherwise, he would have known that Commerce had issued the AD questionnaire on April 18, 2017, and Electrolux's response to section A of the AD questionnaire was due on May 9, 2017, six days after counsel filed his entry of appearance.⁴⁸ Thus, at the time of the entry of appearance, Electrolux had the opportunity to either submit its response to section A of the AD questionnaire, or to timely file a request for an extension.

Instead, on May 24, 2017, a full two weeks after the deadline to submit a response to section A of the AD questionnaire, and almost three weeks after it entered an appearance, Electrolux submitted a letter to Commerce. In this letter, Electrolux claimed that on May 23, 2017, it "checked ACCESS immediately upon learning from the consultants assisting us in this matter that it appeared a questionnaire had been issued," and "we then discovered for the first time that {Commerce} had placed on ACCESS, on April 18, a questionnaire to Electrolux for the fourth administrative review of the antidumping duty order on Large Residential Washers from Mexico."⁴⁹ Thus, it was Electrolux's failure to monitor this administrative review—a review which it requested—that led to its failure to timely respond to the AD questionnaire or submit a request for an extension to do so. Therefore, we find it appropriate to apply facts available to Electrolux pursuant to sections 776(a)(2)(B) and (C) of the Act. Electrolux's inaction was the cause of its failure to provide necessary information by the deadlines for submission of the information, which significantly impeded the proceeding. The admission by Electrolux's counsel that it had not even looked at this record as of May 23, 2017—20 days after it entered an appearance—and only checked ACCESS as a result of being informed by its consultants demonstrates Electrolux's inaction and inadequate monitoring of the review, and supports our decision to apply AFA. Further, Electrolux waited until 23 days after the announcement of the

⁴⁶ See Electrolux's Case Brief at 9 (citing *Nippon Steel*, 337 F. 3d at 1383).

⁴⁷ See Letter from John J. Burke, "Large Residential Washers from Mexico: Entry of Appearance and APO Application," dated May 3, 2016 {sic}; and *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 17188 (April 10, 2017).

⁴⁸ See AD Questionnaire.

⁴⁹ See Electrolux's Letter, "Large Residential Washers from Mexico: Request for Extension for Response to Initial Questionnaire," dated May 24, 2017 (Electrolux Initial Extension Request).

initiation of this review in the *Federal Register* to submit an entry of appearance (on May 3, 2017). Electrolux is no stranger to this proceeding, having participated in the investigation and the subsequent three completed reviews.⁵⁰ In these prior reviews, Electrolux did not delay in submitting its entry of appearance, doing so shortly after the initiations published in the *Federal Register*. Specifically, in the 2014-2014 review, where the initiation published in the *Federal Register* on April 1, 2014, Electrolux entered its appearance on April 3, 2014, and Commerce issued its questionnaire on April 9, 2014. Similarly, in the 2014-2015 review, where the initiation published in the *Federal Register* on April 3, 2015, Electrolux entered its appearance on April 7, 2015, and Commerce issued its questionnaire on April 10, 2015. In the 2015-2016 review, the initiation published in the *Federal Register* on April 7, 2016, and Electrolux entered its appearance on April 11, 2016.⁵¹

When Electrolux finally entered its appearance in this review, it failed to examine the record of this proceeding.⁵² It continued to ignore this responsibility until a third party (*i.e.*, its consultants) alerted it to the issuance of the AD questionnaire. Further, Electrolux's claims that it exerted great effort to submit its questionnaire responses immediately upon learning of the questionnaire deadline does not negate the fact that it failed to participate in the proceeding for over three months prior to that deadline. Also, by failing to participate and impeding the proceeding, we find that Electrolux has failed to cooperate by not acting to the best of its ability to comply with our request for information, and therefore, application of an adverse inference is warranted pursuant to section 776(b) of the Act.

With respect to Electrolux's lack of service claim, the CAFC recently held that the initiation notice published in the *Federal Register* constitutes notice as a matter of law.⁵³ In *Suntec*, a foreign respondent similarly challenged Commerce's application of AFA as a result of its failure to timely file a questionnaire response and claimed a service defect as its defense.⁵⁴ However, the CAFC concluded that the initiation notice published in the *Federal Register* constituted notice as a matter of law, stating that Suntec "was responsible for its own non-participation in the review after that notice."⁵⁵ Like Suntec, Electrolux received constructive and actual notice of the initiation of the instant review when it was published in the *Federal Register*.⁵⁶ As noted by the

⁵⁰ When a party has participated in multiple segments of a proceeding, as is the case with Electrolux, the courts have upheld the application of AFA when information necessary to calculation is missing. *See, e.g., Shenzhen Xinboda Indus. Co., Ltd. v. United States*, 180 F. Supp. 3d 1305, 1315 (CIT 2016) (finding that plaintiff is "no stranger to these types of proceedings and should know" what it needs to do).

⁵¹ Commerce did not issue the questionnaire in the 2015-2016 review until May 2, 2016, because Commerce received model match comments that it had to evaluate prior to the issuance of the questionnaire. Commerce received no such model match comments in this review and, thus, we did not require additional time to issue the questionnaire.

⁵² By failing to submit a timely response in this review, Electrolux also failed to build the record of this proceeding. It is well-established that the burden of creating an adequate record lies with interested parties and not with Commerce. *See, e.g., Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337-38 (CAFC 2016); and *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (CAFC 2011).

⁵³ *See Suntec*, 857 F. 3d at 1369.

⁵⁴ *Id.* at 1368-69.

⁵⁵ *Id.*

⁵⁶ *Id.*; *see also Initiation Notice*, 82 FR 17188 (listing Electrolux as a company to be reviewed for the period of February 1, 2016 to January 31, 2017).

CAFC in *Suntec*, “A foreign exporter or producer that is expressly named in an antidumping order, and is subject to continuing antidumping duties for the protection of U.S. industry, can reasonably be expected to have knowledge of the established mechanism for regular reviews (upon request) to determine the final amount of duties owed, of the potentially severe consequences of non-participation by a foreign entity from a non-market economy, and of the need to maintain representation to monitor developments.”⁵⁷ Moreover, we note that, in *Suntec*, a domestic company requested the review of Suntec as a respondent, while here, Electrolux itself requested this review. This fact pattern demonstrates that Electrolux’s lack of service claims are unavailing, because it knew of the review and merely failed to participate.

Furthermore, Electrolux’s situation in this administrative review is similar to that of the respondent in *Dongtai Peak*, where the CAFC affirmed Commerce’s application of AFA after rejecting the respondent’s untimely-filed supplemental section A response. In *Dongtai Peak*, the Court found that “Commerce reasonably determined Dongtai Peak was entirely capable of at least submitting an extension request on time, but simply failed to do so; therefore, good cause did not exist to retroactively extend the deadline.”⁵⁸ The Court also found in *Dongtai Peak* that “having properly denied the extension requests, Commerce also reasonably determined the Supplemental Response was untimely and removed it from the record.”⁵⁹ The circumstances in the instant review are similar to *Dongtai Peak* in that after denying two untimely-filed extension requests, Commerce removed Electrolux’s untimely-filed section A response from the record of this proceeding. However, unlike *Dongtai Peak*, where the respondent failed to submit a supplemental questionnaire response after having timely submitted other portions of its questionnaire response, Electrolux failed to timely submit any response at all. Thus, after rejecting Electrolux’s untimely-filed section A response, Commerce had no information on the record of the proceeding and appropriately applied AFA to Electrolux.

Electrolux also argues that Commerce “abused its discretion” and used a “bright-line rule” in rejecting its section A submission. This argument ignores the facts of this case. Commerce denied Electrolux’s untimely-filed requests for an extension of the deadline *before* it rejected Electrolux’s section A submission. After being twice informed that it could not have an extension, Electrolux nevertheless submitted its section A response. Section 351.104(a)(2)(iii) of Commerce’s regulations states that, “In no case will the official record include any document that the Secretary rejects as untimely filed, or any unsolicited questionnaire response unless the response is a voluntary response under Section 351.204(d).” Thus, Commerce acted consistently with its regulations by rejecting Electrolux’s unsolicited questionnaire response.

Moreover, Electrolux argues that it submitted its responses within a reasonable length of time prior to Commerce’s *Preliminary Results*, and accuses Commerce of failing to consider accuracy and fairness against the burden placed on it. In making this accusation, Electrolux fails to acknowledge the effects on fairness were Commerce to grant its untimely filed extension request. In fact, fairness is *the very reason* that Commerce twice denied Electrolux’s untimely-filed section A extension requests. Had Commerce granted the request—which was first made a full two weeks after the section A response due date—it would have granted Electrolux special

⁵⁷ See *Suntec*, 837 F. 3d 1370.

⁵⁸ See *Dongtai Peak*, 777 F. 3d at 1347.

⁵⁹ *Id.*

treatment that other interested parties do not ordinarily receive. With extremely limited exceptions (as discussed below), Commerce strictly enforces its case-specific deadlines. This ensures that all interested parties are afforded the same opportunity to participate in proceedings. Further, regarding accuracy, Electrolux has not established that the results of this administrative review are inaccurate. Therefore, contrary to Electrolux's claim, interests of fairness and accuracy do not weigh in favor of not relying on AFA in determining Electrolux's dumping margin.

With respect to Electrolux's argument that Commerce should, at least, have accepted its responses to sections B through D as timely, Commerce requires *all* portions of a questionnaire response in order to accurately determine a dumping margin. The information contained in section A informs the treatment of the sales and accounting information contained in sections B through D of the questionnaire, and can greatly affect a calculated dumping margin. For example, section A contains information regarding a company's: 1) selling functions, which Commerce uses in its level of trade (LOT) analysis to determine whether a company is entitled to a LOT adjustment or constructed export price offset; and 2) affiliates, which may affect whether Commerce applies the arm's length test or disregards certain transactions between affiliates. Therefore, Commerce cannot accurately conduct its analysis and calculate a margin when an integral portion of a questionnaire response (*i.e.*, section A) is not on the record.

Finally, Electrolux argues that Commerce was required to provide it with an opportunity to remedy or explain a deficient response. However, in the instant review, Electrolux failed to submit any response at all. The Act's requirement to afford a party the opportunity to remedy or explain a deficiency in a response is predicated on having a response on the record of a proceeding in the first place. Therefore, Commerce did not fail to provide Electrolux with an opportunity to correct a deficiency, because there was no deficient response. Consequently, we disagree that *China Kingdom*, where Commerce refused to accept information at verification related to changes in the factors of production, is analogous to the instant review. Unlike the respondent in *China Kingdom*, Electrolux failed to timely submit any questionnaire response and, thus, the record contains no response at all. As a result, we continue to assign Electrolux a margin based on AFA for purposes of these final results.

Comment 2: Electrolux's Untimely Filed Responses and Requests

Electrolux's Brief

- Commerce's "second chance rule," in which it allows law firms to make one untimely submission or extension request—and after which no such allowance is made—results in parties bearing the consequence of a law firm's error in an unrelated proceeding on behalf of a different party.
- Commerce previously afforded BakerHostetler the opportunity to make a submission past a deadline and, therefore, determined that the law firm had "one strike." This policy is unlawful, extraordinary, and unprecedented. The law does not permit Commerce to impose such a bright line rule.⁶⁰

⁶⁰ See Electrolux's Case Brief at 14 (citing *NTN Bearing*, 74 F. 3d 1204).

- As a result of this “rule,” a client must track the activity of its law firm in order to keep track of whether it might suffer the consequences of having a late submission rejected in a proceeding. This is not possible, as there is no information concerning the status of a law firm with regard to the “second chance” rule and whether it has received a “strike.”
- Electrolux had no way to know that a minor filing error in any proceeding before Commerce would result in the total rejection of its questionnaire responses, and an administrative authority cannot impute the error of counsel in an unrelated proceeding to the one at issue.⁶¹ Such action exceeds Commerce’s power and is an abuse of discretion.
- Commerce’s “second chance rule,” which results in a damaging and commercially prohibitive dumping rate, is a violation of administrative due process under 5 U.S.C. 706, because actions by an administrative agency that implement a rule such as this must be subject to a notice and comment period.⁶² However, the “second chance rule” was not subject to notice and comment as required by the Administrative Procedure Act.

Petitioner’s Rebuttal Brief

- It is Commerce’s court-affirmed practice to reject untimely filed factual information and apply AFA.⁶³
- Only in limited circumstances not present in this review has Commerce permitted exceptions to its factual information deadlines. In those instances, parties missed deadlines by hours, not by weeks. In *Cold Rolled from Korea*, a party missed a 12:00 pm deadline and contacted Commerce on the same day for an extension.⁶⁴ In *WLP from Turkey*, the respondent missed a deadline and began filing after 5:00 pm, but contacted Commerce on the next business day to request an extension.⁶⁵ In *Lumber from Canada*, the respondent failed to file a portion of its response and contacted Commerce that evening to request an extension of the deadline.⁶⁶ Finally, in *Hot Rolled from the U.K.*,

⁶¹ *Id.* at 15 (citing *Matter of Case*, 937 F. 2d 1014, 1023-24 (5th Cir. 1991) (“the conduct of the parties in the state action cannot be said to affect the exercise of judicial authority of the [present] court or limit the [present] court’s power to control the behavior of parties and attorneys in the litigation before it.”)).

⁶² *Id.* at 16 (citing 5 U.S.C. 553(b)-(c), and 551(4), which Electrolux states defines a rule as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.”).

⁶³ See Petitioner’s Rebuttal Brief at 13 (citing *Antidumping Duty Investigation of Certain Amorphous Silica Fabric from the People’s Republic of China: Final Affirmative Determination of Sales at Less-Than-Fair Value, and Final Affirmative Determination of Critical Circumstances*, 82 FR 8399 (January 25, 2017) (*Silica Fabric from China*); *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Final Determination of Sales at Less Than Fair Value*, 79 FR 76966 (December 23, 2014) (*Silicon Products from Taiwan*); and *Neo Solar Power Corp. v. United States*, 190 F. Supp. 3d 1255 (CIT 2016)).

⁶⁴ *Id.* at 14 (citing *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 FR 49953 (July 29, 2016) (*Cold Rolled from Korea*)).

⁶⁵ *Id.* (citing *Welded Line Pipe from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 80 FR 61371 (October 13, 2015) (*WLP from Turkey*)).

⁶⁶ *Id.* at 15 (citing *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 FR 51806 (November 8, 2017) (*Lumber from Canada*)).

the respondent missed a 10:00 am deadline, and filed an extension request the same day.⁶⁷

- In the above-cited instances, Commerce exercised its discretion in balancing its interests in managing its proceedings against the length of time a submission was late.⁶⁸
- In the instant review, Electrolux—which had been represented by the same counsel through the three previous administrative reviews—missed Commerce’s deadline by weeks. Also, Electrolux had not already filed parts of its response such that an extension would permit it to complete its filing. Moreover, Electrolux’s actions signaled to parties that it did not intend to participate in this review.
- In the limited instances where Commerce granted untimely filed extension requests to parties who missed a deadline by hours, those parties were informed that any such additional oversight would result in information being removed from the record. BakerHostetler was already afforded one such opportunity. This case is, therefore, different from other situations in which Commerce departed from the plain language of its regulations.
- The courts have held that “Commerce... must follow its own regulations,” and that “{the courts} strongly deplore Commerce’s or any other agency’s failure to follow its own regulations... {as s}uch failure harms those who assume agency compliance and are prejudiced by non-compliance.”⁶⁹ Therefore, in the instant review, Commerce needed a reason not to apply its regulations requiring the rejection of an untimely-filed response. Commerce correctly found that the circumstances did not warrant such action.

Commerce’s Position: As an initial matter, we disagree with Electrolux that Commerce has a “second chance rule.” Rules guide an agency and codify its behavior, and Commerce is not bound to act by any “second chance rule.” Rather, Commerce has, in very limited circumstances, allowed parties who missed a deadline by a short period of time and for a clearly articulated reason to file untimely extension requests. In these very limited instances, Commerce officials met directly with the interested party’s counsel to impress upon them the importance of administrative deadlines and communicate to counsel that they would not be afforded a second opportunity to miss a deadline in that or any other proceeding.

In the instant proceeding, we note that Electrolux did not miss its deadline by a very short period of time; it missed its deadline to submit an extension request by two weeks. Electrolux claimed that it was unaware that Commerce had issued the questionnaire and, by extension, did not know there was a deadline by which it needed to respond. These circumstances are materially different from the examples that Electrolux cites in which Commerce granted untimely-filed extension requests. Electrolux, unlike other parties who missed a deadline for an administrative reason (*i.e.*, a mistaken understanding of a deadline or a technical difficulty with ACCESS), claims it missed the deadline because it did not know there was one. However, as discussed in Comment 1 above, Electrolux’s unawareness of the deadline was a result of its own failure to participate

⁶⁷ *Id.* (citing *Carbon and Alloy Steel Wire Rod from the United Kingdom*, 82 FR 50394 (October 31, 2017) (*Hot Rolled from the U.K.*)).

⁶⁸ *Id.* at 15-16 (citing, *e.g.*, *Silica Fabric from China*, 82 FR at 8402).

⁶⁹ *Id.* at 17 (citing *Torrington C. v. United States*, 82 F. 3d 1039, 1049 (CAFC 1996); and *Kemira Fibres Oy. V. United States*, 61 F. 3d 866, 875-876 (CAFC 1995)).

after it had requested the review, per the usual course, and we published the notice of initiation in the *Federal Register*.

Moreover, if Commerce were to accept Electrolux's argument, then any party to a proceeding would be able—without consequence—to fail to file an entry of appearance, fail to monitor the *Federal Register*, and fail to review the record of a proceeding after filing an entry of appearance and later claim lack of service if it receives a margin based on AFA. Allowing parties to act in this manner would undermine Commerce's regulations and the procedures in place for conducting AD and countervailing duty (CVD) proceedings.⁷⁰

Pursuant to our regulations, Commerce could have lawfully rejected any of the untimely-filed submissions that Electrolux mentioned above. The acceptance of those untimely submissions was within Commerce's discretion to act equitably in limited situations where a party intended to meet the deadline and promptly notified Commerce to request an extension when it realized that it had not done so. In such limited situations, Commerce simply made clear to counsel given permission to file a late submission that they would not be afforded a second such opportunity. Electrolux's claim that these instances constitute a "rule" that should have been published in the *Federal Register* and subject to public comment is incorrect. We find it particularly illustrative that, in the absence of this purported rule, Electrolux's submission would, nevertheless, have been rejected pursuant to Commerce's regulations. Therefore, Electrolux could not have been prejudiced by Commerce's acceptance of untimely filed responses in other limited circumstances where—unlike in the instant proceeding—a party missed a deadline by a matter of hours, not weeks, and promptly notified Commerce to request an extension.

Comment 3: Selection of the AFA Rate

Electrolux's Brief

- The AFA rate of 72.41 percent Commerce assigned to Electrolux in the *Preliminary Results* is punitive and aberrational. The CAFC has noted that "the purpose of {the AFA statute} is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins."⁷¹
- Although Commerce may rely upon secondary information from the less-than-fair-value (LTFV) investigation in applying AFA, it must corroborate that information using independent sources.⁷² However, Commerce did not corroborate the AFA rate that it applied to Electrolux.

⁷⁰ See Electrolux Initial Extension Request at 2, stating, "The Department's regulations provide that questionnaire responses are due 30 days from receipt with receipt presumed to be 7 days from the date the questionnaire is transmitted... As Electrolux was not notified of the existence of the questionnaire, our discovery of it yesterday on ACCESS should be considered the day it was transmitted."

⁷¹ See Electrolux's Case Brief at 17 (citing *F. Ili De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032 (Fed. Cir. 2000) (*De Cecco*); and *Artisan*, 978 F. Supp. 2d at 1343).

⁷² *Id.* at 17 (citing section 776(c)(1) of the Act).

- The CAFC has rejected margins that were ten times higher than the average dumping margin of other producers and five times higher than the highest rate applied to a cooperative respondent.⁷³
- Commerce has not shown a relationship between Electrolux's circumstances and those of Samsung, the respondent which received the 72.41 percent rate in the LTFV investigation. Additionally, Commerce did not address either the reasonableness of this rate or why it is appropriate given Electrolux's own margins of: 1) 36.42 percent in the LTFV investigation; and 2) 6.22 percent, 2.47 percent, and 3.67 percent in the three completed administrative reviews in this proceeding.

Petitioner's Rebuttal Brief

- Commerce correctly assigned Electrolux an AFA rate applied to two other companies in the LTFV investigation, which is the highest margin assigned in this proceeding. Moreover, Commerce corroborated this rate in the LTFV investigation.⁷⁴
- The cases Electrolux cited in support of its position that Commerce is required to establish that the AFA rate assigned to it are related to its current position have been superseded by Congress' directive that Commerce "shall not be required to corroborate any dumping margin... applied in a separate segment of the same proceeding."⁷⁵

Commerce's Position: We continue to assign an AFA dumping margin of 72.41 percent to Electrolux in these final results. Section 776(b) of the Act states that Commerce, when employing an adverse inference, may rely upon information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record.⁷⁶ In selecting a rate based on AFA, Commerce selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.⁷⁷

Electrolux argues that, in determining an AFA rate, Commerce should consider the AD rates it received in the LTFV investigation and the three previous administrative reviews of this AD order. However, those rates (*i.e.*, 36.42 percent, 6.22 percent, 2.47 percent, and 3.67 percent, respectively) are all insufficiently adverse to ensure that Electrolux does not obtain a more favorable result by failing to cooperate than if it had done so. It would also be inappropriate to apply as an AFA rate any margin Commerce calculated for Electrolux based on the information it provided as a cooperative respondent in prior reviews because, as discussed above, Electrolux failed to cooperate to the best of its ability in the instant review.

⁷³ *Id.* at 17 (citing *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F. 3d 1319, 1323-24 (Fed Cir. 2010) (*Gallant Ocean*) (where the Federal Circuit rejected margins that were more than ten times higher than the average dumping margin for cooperating respondents, and five times higher than the highest rate applied to a cooperative respondent)).

⁷⁴ *Id.* at 19 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from Mexico*, 77 FR 76288 (December 27, 2012) (*LRW Mexico LTFV Final*)).

⁷⁵ See Petitioner's Rebuttal Brief at 18 (citing section 776(c)(2) of the Act).

⁷⁶ See also 19 CFR 351.308(c).

⁷⁷ See SAA at 870.

We also disagree with Electrolux that *De Cecco* and *Gallant Ocean* support its argument that the AFA rate assigned here is too high. Both of these cases were decided prior to the issuance of the *TPEA*, which made numerous amendments to the AD and CVD law, including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act.⁷⁸ Sections 776(d)(1)(B) and (d)(2) of the Act specifically provide that Commerce may: 1) “use any dumping margin from any segment of the proceeding under the applicable antidumping order;” and 2) “may apply any of the ... dumping margins specified under that paragraph, including the highest such ... margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.”⁷⁹ Furthermore, section 776(d)(3) of the Act provides that Commerce is not required either “to estimate what the ... dumping margin would have been if the interested party found to have failed to cooperate under subsection (b)(1) had cooperated” or “to demonstrate that ... dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.”⁸⁰ Therefore, Electrolux’s reliance on *De Cecco* and *Gallant Ocean* is unavailing because *De Cecco* and *Gallant Ocean* pre-date the *TPEA* amendments, which apply here. Consequently, the rate assigned to Electrolux in this administrative review is in accordance with the *TPEA*’s amendments to the Act.

Finally, we disagree that Commerce must corroborate the 72.41 percent AFA rate assigned to Electrolux in this administrative review. Although section 776(c) of the Act used to provide that, where Commerce relies on secondary information rather than information obtained during the course of a review, it must corroborate that information using independent sources that are reasonably at its disposal, the *TPEA* modified section 776(c) of the Act. This provision of the Act now directs that Commerce “shall not be required to corroborate any dumping margin ... applied in a separate segment of the same proceeding.”⁸¹ Accordingly, because we are applying as the AFA rate a dumping margin assigned in a prior segment of this proceeding (*i.e.*, the LTFV investigation), it is unnecessary to corroborate this margin pursuant to section 776(c)(2) of the Act.⁸²

⁷⁸ See *Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015) (*TPEA*). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, Commerce published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the ITC. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015). Accordingly, the amendments apply to this administrative review.

⁷⁹ See sections 776(d)(1)(B) and (d)(2) of the Act.

⁸⁰ See sections 776(d)(3)(A) and (B) of the Act.

⁸¹ See section 776(c)(2) of the Act.

⁸² Thus, because Commerce is not required to corroborate the AFA margin assigned to Electrolux in the instant proceeding, we disagree that *Artisan* applies here.

VI. 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 this review and the final dumping margin in the *Federal Register*.



Agree



Disagree

3/12/2018

X



Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping Countervailing Duty Operations
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance