

**STRIKING A BALANCE BETWEEN NECESSITY AND
FAIRNESS: THE USE OF ADVERSE FACTS
AVAILABLE IN DUMPING AND SUBSIDIES
INVESTIGATIONS**

RAGAN UPDEGRAFF*

ABSTRACT

Under 19 U.S.C. § 1677e(b), Congress has granted the Department of Commerce (“Commerce”) discretion to apply adverse facts available (“AFA”) against foreign respondents in dumping and subsidies investigations. Commerce exercises this authority when the agency finds that a respondent has provided missing or otherwise deficient information and that it has failed to cooperate by responding to Commerce’s questions to the “best of its ability.” When this occurs, Commerce will replace the missing or otherwise deficient information with information that it considers adverse enough to deter non-cooperation. Oftentimes, this information results in ad valorem dumping and countervailing duty margins over 100%, and as a result, is one of the most hotly contested United States trade practices today. This Article argues that the AFA law must strike a balance between the need for Commerce to use inferences that may at times be adverse to respondents in order to conduct effective investigations and the need for rules that protect against even the appearance of an abuse of discretion. In order to understand the issue, Part I will offer a brief introduction while Part II will explore arguments for and against the application of AFA in order to understand the policy rationales and concerns behind the rules. Part III will then analyze the limits that U.S. courts have placed both on when and how Commerce uses AFA. In turn, Part IV will analyze the limits that the WTO places on when and how Commerce and the national investigating authorities of other WTO Member states use AFA. Part V will conclude by addressing how Commerce’s current “AFA approach” fails to strike a balance between necessity and fairness in applying adverse inferences and how Commerce’s current practices may be reformed to strike such a balance.

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* Ragan Updegraff is an Associate at Morris, Manning, & Martin LLP’s international trade practice. The views expressed in this Article are those of the author and not necessarily those of Morris, Manning, & Martin, LLP. They in no way represent any official view of the firm or its partners. © 2018, Ragan Updegraff.

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"An opinion, legal or otherwise, is only as good as the facts upon which it is based."

—Eugene C. Gerhardt¹

I. INTRODUCTION

The success of any investigation depends on the ability of the investigators to access information. While investigated parties may, at times, voluntarily produce information to investigators, commonsense dictates that investigated parties will often be reluctant to turn over information that may become evidence supporting an adverse determination. In order to solve this problem, many investigators have the power to compel investigated parties to produce information through subpoena.

1. Eugene C. Gerhardt, *The Fountainhead of the Law: Ex Facto Oritur Jus*, 36 A.B.A. J. 533, 533 (1950).

However, when investigators do not have subpoena power, as is the case with the Department of Commerce (“Commerce”) in dumping and subsidies investigations, other coercive means must be found to compel foreign respondents to produce information that would not otherwise be in their interests to produce.² Thus, in dumping and subsidies law, the use of adverse inferences, *i.e.* the application of adverse facts available (“AFA”), has particular utility because it deters non-cooperation.³

When necessary information is missing from the administrative record in a dumping or subsidies investigation, Commerce will inevitably be forced to replace that information with facts otherwise available (“FA”).⁴ Where no adverse inference is to be drawn, Commerce will attempt to use the best information it has available.⁵ This practice is rarely controversial because there would be no way for Commerce to proceed in an investigation if it could not replace missing information with information that is otherwise available. It is also clearly accepted

2. Unlike the Department of Commerce, the International Trade Commission (“ITC”) does have subpoena power, *see* 19 U.S.C. § 1333(a) (2017), although this power over foreign parties is limited by territorial jurisdiction. *See* In the Matter of Certain Pers. Computers & Digital Display Devices Order No. 5: Relating to Unsigned Subpoenas and to Respondents’ 7/11/07 Letter on Protective Order, Inv. No. 337-TA-606, USITC Pub. 5 2007 WL 2070868 at *4 (July 12, 2007) (“The statute clearly states that the Commission can require a witness or production of documents from *any place in the United States*. It does not state that it may require such production or attendance from anywhere in the world.”) (emphasis added). Although it could, like Commerce, apply AFA in order to compel production over these parties, the ITC, very much unlike Commerce, rarely does so. *See* Geo Specialty Chemicals, Inc. v. United States, 33 C.I.T. 125, 2009 WL 424468 (Ct. Int’l Trade 2009) (“Unlike the Department of Commerce, which often draws adverse inferences against particular non-cooperative companies when calculating dumping margins . . . , the Commission rarely draws adverse inferences because its decisions affect all industry participants.”).

3. *See* Essar Steel, Ltd. v. United States, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (“Because Commerce lacks subpoena power, Commerce’s ability to apply adverse facts is an important one.”); *see also* Atlanta Sugar, Ltd. v. United States, 742 F.2d 1556, 1560 (Fed. Cir. 1984) (finding that even though the ITC has subpoena power, the use of adverse facts is justifiable given the agency’s workload and limited resources because it serves “as an investigative tool, which [the] agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest.”).

4. *See* 19 U.S.C. § 1677e(a)(1) (2017) (providing that Commerce may apply FA “if necessary information is not available on the record”). Commerce may also apply FA if it finds that an interested party or any other person has withheld information, failed to provide information within deadlines set by it or in the form and manner requested, “significantly imped[ed]” an investigation or review, or provided information that could not be verified.” *See* 19 U.S.C. § 1677(a)(2) (2017). Note that in regard to this second set of circumstances, Commerce will also find that the party has not acted to the best of their ability and apply not just FA, but AFA, as discussed *infra* Part III.A.

5. *See infra* at Part III.

under international law set forth by the World Trade Organization.⁶ However, under U.S. law, Commerce may also apply AFA in circumstances where it 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.”⁷ In this circumstance, Commerce will not simply select from the best information otherwise available to replace that information which the non-cooperative party failed to provide, but will seek instead, in the words of the statute, to “use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.”⁸ In other words, if Commerce has multiple facts available that may replace the missing necessary information, it will likely select the fact which is most adverse to the non-cooperative party.⁹

Use of AFA may be, in the parlance of Commerce, either “partial” or “total.”¹⁰ Partial AFA is applied when an adverse inference is drawn to

6. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 6.8, Annex II, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter AD Agreement]; Agreement on Subsidies and Countervailing Measures art. 12.7, Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

7. See 19 U.S.C. § 1677e(b)(1) (2017).

8. See *id.* § 1677e(b)(1)(A) (2017). For a useful summary contrasting how AFA and “facts otherwise available” are different, see U.S. COURT OF INTERNATIONAL TRADE 19TH JUDICIAL CONFERENCE, GETTING DOWN TO THE FACTS: DEVELOPING THE RECORD AND USING AFA (2016), http://www.cit.uscourts.gov/Judicial_Conferences/19th_Judicial_Conference/19th_Judicial_Conference_Papers/Trade-GettingDownToFactsAFA.pdf [hereinafter CIT 19th Judicial Conference AFA Session]. While § 1677e(b) allows for “adverse inferences,” or AFA, § 1677e(a) provides for the use of “facts otherwise available” to replace necessary information that is not available on the record. See *id.* (quoting *Mueller Comercial de Mexico v. United States*, 753 F.3d 1227, 1231-32 (Fed. Cir. 2014) (“The two subsections have different purposes. Subsection 1677e(a) . . . may be used whether or not any party has failed to cooperate fully with the agency in its inquiry. In contrast, subsection 1677e(b) . . . authorizes an inference adverse to an interested party when “Commerce makes the separate determination that [the party] has failed to cooperate by not acting to the best of its ability.”)).

9. For example, the AFA statute provides that it is within Commerce’s “discretion” to, in antidumping cases, apply the highest non-*de minimis* rate determined in the same investigation or review; or, in subsidies proceedings, to apply the highest non-*de minimis* rates calculated for same or similar programs involving the same country. See 19 U.S.C. § 1677e(d)(2) (2017). Commerce is in no way required to do so. See Appellate Body Report, *United States—Countervailing Measures on Certain Hot Rolled Carbon Steel Flat Products from India (Carbon Steel (India))*, ¶¶ 4.474-483, WTO Doc. WT/DS436/AB/R (adopted Dec. 19, 2014) [hereinafter *US—Carbon Steel (India)*] (discussing Commerce’s discretion to apply AFA in contrast to any legal requirement that it actually do so).

10. See DEPARTMENT OF COMMERCE, ENFORCEMENT & COMPLIANCE ANTIDUMPING MANUAL 13-17 (2015), <http://ia.ita.doc.gov/admanual/index.html> [hereinafter *Antidumping Manual*] (providing examples of partial and total AFA). For a useful discussion of this distinction as understood by the Federal Circuit and the Court of International Trade, see *Zhejiang DunAn Hetian Metal Co. v.*

replace discrete “parts” of the response that are missing from the record, whereas total AFA is when an adverse inference is applied to the “entire response.”¹¹ To further distinguish the two, when partial AFA is applied, the replacement usually comes from information that the respondent did provide. For instance, in a dumping investigation where a respondent is found to have failed to cooperate because it did not report some of its sales, Commerce may, as a result, apply the highest transaction-specific margin based on the respondent’s own data to calculate the margin for those missing sales.¹² Total AFA, on the other hand, may be applied when the missing information is “core, not tangential,” or “where none of the reported data is reliable or usable.”¹³

When total AFA is applied, the non-cooperative respondent’s information is often altogether rejected. Instead, the antidumping or countervailing duty rate is based on information not sourced from the respondent—in investigations, the higher of the highest rate alleged in the petition or the highest rate calculated for any respondent in the same investigation (in non-market economy (“NME”) cases, this is often the country-wide entity rate, which itself is based on AFA); in administrative reviews, the highest rate on the record in the same or previous segment of the same proceeding.¹⁴ That said, there are a handful of

United States, 652 F.3d 1333, 1345-48 (Fed. Cir. 2011); *Papierfabrik August Koehler SE v. United States*, 7 F. Supp. 3d 1304, 1313-14 (Ct. Int’l Trade 2014).

11. See Antidumping Manual, *supra* note 10, at 13.

12. See, e.g., Final Determination of Sales at Less-Than-Fair-Value: Silica Bricks and Shapes from the People’s Republic of China, 768 Fed. Reg. 70,918 (Dep’t of Commerce Nov. 27, 2013); Issues and Decision Memorandum for Final Determination of Sales at Less-Than-Fair-Value: Silica Bricks and Shapes from the People’s Republic of China, 14-15 (Nov. 20, 2013), <https://enforcement.trade.gov/frn/summary/prc/2013-28551-1.pdf>. Partial AFA may also be applied in subsidies cases. See, e.g., Certain Pasta from Italy: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review; 2012, 79 Fed. Reg. 50,618 (Dep’t of Commerce Aug. 25, 2014); Issues and Decision Memorandum for Certain Pasta from Italy: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 5-7 (Aug. 18, 2014), <https://enforcement.trade.gov/frn/summary/italy/2014-20152-1.pdf> (finding as partial AFA a tax program to provide a financial contribution and to be specific due to the Government of Italy’s failure to cooperate, but using the respondent’s own information to calculate the benefit received).

13. See *Papierfabrik August Koehler SE v. United States*, 7 F. Supp. 3d 1304, 1313 (Ct. Int’l Trade 2014) (quoting *Since Hardware (Guangzhou) Co. v. United States*, 34 C.I.T. 1262,1274, 2010 WL 3982277 (Ct. Int’l Trade 2010) and *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011)).

14. See, e.g., Certain Carbon and Alloy Steel Cut-to-Length Plate From Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 82 Fed. Reg. 16,345 (Dep’t of Commerce Apr. 4, 2017); Issues and Decision Memorandum for Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical

determinations where Commerce's application of total AFA uses respondents' own data to determine the margin of dumping or subsidization. For instance, in dumping investigations, Commerce sometimes uses the highest transaction-specific rate calculated for the non-cooperative respondent, which, when this has happened, is unsurprisingly higher than the highest rate calculated for any of the other respondents.¹⁵ In subsidies cases in which Commerce applies total AFA, Commerce uses an established hierarchy of secondary sources for selection of the AFA rate.¹⁶ Typically, Commerce uses the highest non-*de minimis* rate assigned to another respondent using the same or similar program in any segment of the same proceeding.¹⁷ If no such rate has been calculated, then Commerce will use the highest non-*de minimis* rate calculated for the same or similar program in another proceeding involving

Circumstances, at 7 (Mar. 29, 2017), <https://enforcement.trade.gov/frn/summary/italy/2017-06630-1.pdf> ("Use of Adverse Facts Available"); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013, 80 Fed. Reg. 40,998 (Dep't of Commerce July 14, 2015)); Issues and Decision Memorandum for Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments, at 23-35 (Jul. 7, 2015), <https://enforcement.trade.gov/frn/summary/prc/2015-17241-1.pdf>. All five examples of total AFA that Commerce provides in its Anti-Dumping Manual involve Commerce altogether ignoring information provided by the non-cooperative respondent. See Antidumping Manual, *supra* note 10, at 15-17.

15. See, e.g., Magnesium Metal from the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 Fed. Reg. 39,919, at 10-15 (Dep't of Commerce Aug. 10, 2009) (assigning as total AFA the highest transaction-specific rate calculated for a respondent (43.58%) as the overall dumping margin rather than the highest margin calculated for a respondent (21.71%) because the lower rate did "not provid[e] ample incentive to cooperative in future administrative reviews").

16. See 19 U.S.C. §§ 1677e(d)(1)(A)(i), 1677e(d)(2) (codifying Commerce's standard total AFA approach in subsidies investigations as affirmed in *Essar Steel Ltd. v. United States*, 908 F. Supp. 2d 1306, 1310 (Ct. Int'l Trade 2013)) (note that the statute provides that Commerce "may" use the highest rate, granting it discretion rather than requiring it do so); see also *SolarWorld Americas, Inc. v. United States (Solar World)*, 229 F. Supp. 3d 1362, 1366 (Ct. Int'l Trade 2017) (explaining Commerce's standard total AFA approach in subsidies investigations).

17. See 19 U.S.C. §§ 1677e(d)(1)(A)(ii), 1677e(d)(2). Note that Commerce has used a slightly different hierarchy in administrative reviews, using for its second alternative the rate applied for a similar program used by a company in the same proceeding rather than the rate calculated for the same program in a different proceeding (even if that rate is different from that calculated for the same respondent for use of that program in the investigation). See *Solar World*, 229 F. Supp. 3d at 1367-68 (upholding Commerce's discretion to use a different methodology in reviews than in investigations as reasonable because "[i]t is discernible that Commerce believes there is a smaller benefit to relying on rates from the industry in investigations than in reviews. That smaller benefit is diminished further by the potential effect on inducement: with fewer rates from which to choose, it is more likely that there will be fewer high rates with which to induce cooperation.").

the same country.¹⁸ Where this is not possible, Commerce will use the highest calculated rate for any program the same country that the industry subject to the proceeding could have used.¹⁹

In contrast to its use of FA, the United States' use of AFA is one of the most polemical practices in international trade law today. A large part of this is due to the United States' increased and more emboldened use of AFA in recent years, including in several cases where total AFA has resulted in *ad valorem* antidumping and countervailing duty rates of over 100%.²⁰ In one dumping case, application of total AFA resulted in a margin over 700%.²¹ And it is not just the end-result that has drawn criticism—it is also the manner in which Commerce has applied AFA. For example, in one 2017 subsidies case against China, total AFA was applied against a non-cooperative respondent at the preliminary determination rather than waiting until the final determination on the basis that the respondent had withheld necessary information.²² The result of applying total AFA at this early phase of the investigation was the exclusion of the non-cooperative respondent not only from verification

18. *See Solar World*, 229 F. Supp. 3d at 1367-68.

19. Note that the amended AFA statute also allows Commerce to use a rate from any proceeding that it "considers reasonable to use." *See id.*

20. Michael O. Moore, *U.S. 'Facts Available' Antidumping Decisions: An Empirical Analysis*, 22 EUR. J. POL. ECON. 639, 644 (2006) (quantifying an increase of Commerce's use of AFA following conclusion of the Uruguay Rounds and an increase in the average dumping margins in cases in which AFA was applied); *see also* Bruce A. Blonigen, *Evolving Discretionary Practices of U.S. Antidumping Activity*, 39 CANADIAN J. ECON. 882-83 (2006), <https://pdfs.semanticscholar.org/13e3/54a051b556bbd4556875eea655a02ff5a5be.pdf> (noting that between 1980-85 only 10.6% of cases before Commerce involved FA or AFA findings compared to 39.6% between 1995-2000). Of final determinations in antidumping and countervailing duty investigations and reviews between October and December 2017 (excluding those expedited sunset reviews and determinations and results in which Commerce did not release an issues and decision memorandum), Commerce applied AFA in four of twelve antidumping proceedings (33%) (three of which involved China) and in seven of ten CVD proceedings (70%) (including all four involving China).

21. *See* Certain Carbon and Alloy Steel Wire Rod From Belarus, the Russian Federation, and the United Arab Emirates: Affirmative Final Determinations of Sales at Less Than Fair Value and Partial Affirmative Finding of Critical Circumstances, 82 Fed. Reg. 56,214 (Dep't of Commerce Nov. 28, 2017) (setting a total AFA antidumping margin for two Russian producers at 756.93%).

22. *See* Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination With Final Antidumping Duty Determination, 82 Fed. Reg. 19,022 (Dep't of Commerce Apr. 25, 2017); Issues and Decision Memorandum for Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination With Final Antidumping Duty Determination, at 24-31 (Apr. 17, 2017), <https://enforcement.trade.gov/frn/summary/prc/2017-08328-1.pdf>.

but also from any opportunity to respond to the petitioners' new subsidy allegations, which were not initiated until two months after the preliminary determination.²³ Although Commerce made no efforts whatsoever to inquire as to the non-cooperative respondent's use of the alleged subsidies, it nonetheless, as total AFA, concluded that the non-cooperative respondent had benefitted not only from all of the programs that petitioners had initially initiated, but also from those programs alleged in the new subsidy allegations on which Commerce had initiated.²⁴ The resulting *ad valorem* countervailable subsidy rate was 194.90%.²⁵ As a result of Commerce investigations such as this one, as well as use of AFA by the national investigating authorities of other WTO members, there is organized concern at the WTO that use of AFA has grown out of control.²⁶

Although adverse inferences are prevalent and appear frequently in other fields of law, the reason for this concern in trade investigations, put simply, is that the application of AFA in dumping and subsidies proceedings carries with it concerns that do not attend other types of investigations. First, the contours of dumping and subsidies investigations,

23. See Memorandum to James Doyle, Director, AD/CVD Operations, Office V, from Justin M. Neuman, Senior International Trade Compliance Analyst, AD/CVD Operations, Office V, "Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China: New Subsidy Allegations" (June 15, 2017).

24. Although Commerce insisted at the final determination that the excluded non-cooperative respondent was still a mandatory respondent in the investigation, in its questionnaires issued to the Government of China regarding the new subsidies allegations it inquired only as to the cooperative respondent's use of the alleged programs. Letter to Government of the People's Republic of China from Paul Walker, Program Manager, AD/CVD Operations, Office V, Enforcement & Compliance, Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China: New Subsidy Allegations Questionnaire, at 1 (Dep't of Commerce June 16, 2017); Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part, Countervailing Duty Investigation, 82 Fed. Reg. 53,473 (Dep't of Commerce Nov. 16, 2017); Issues and Decision Memorandum for Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part, Countervailing Duty Investigation, cmt. 1 (Nov. 6, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-11-16/html/2017-24864.htm> [hereinafter *Hardwood Plywood Final IDM*].

25. *Hardwood Plywood Final IDM*, *supra* note 24, at 13.

26. See Claire Schachter, Ragan Updegraff & Anna Weinberger, *Building the Capacity of Anti-Dumping Regimes in Developing Countries*, TRADELAB (Sept. 10, 2017), <https://tradelab.legal.io/guide/59b4f8b0174a2b07c328ab6c/Building+the+Capacity+of+Anti+Dumping+Regimes+in+Developing+Countries> (comparing investigating authorities' use of facts available, including adverse facts available). The recent attention that Commerce's use of AFA has received at the WTO, discussed *infra* Part IV, evidences this discontent. See also Michael Andrews, *The Facts Available on 'Facts Available': An Analysis of Article 6.8 and Annex II of the WTO Anti-Dumping Agreement*, 6 N.Z. J. PUB. & INT'L L. 11, 34-35 (2008) (providing a negotiating history of facts available and the AD Agreement).

which involve behemoth amounts of information, are unique. This information in dumping investigations includes foreign exporters and producers' sales, production and distribution costs, and other detailed information about business practices. In subsidies investigations, information required includes even the smallest government payment and interaction with the government or a government-controlled entity that might be interpreted as a government program providing assistance. All of this information must be submitted under frequently tight deadlines of just a few weeks.²⁷ With so much information to be produced in such a short amount of time, mistakes are inevitable. Second, dumping and subsidies investigations pit domestic industry and their international competitors against one another before a national investigating authority that, at least in appearance, may not be seen as the most objective arbiter.²⁸ While Commerce does attempt to act as a neutral arbiter and often succeeds in so doing, when an agency that is also responsible for promoting U.S. business and the leadership of which is not only appointed by but serve at the pleasure of the U.S. president is charged with serving as both the investigator and an arbiter in trade investigations, skepticism of that agency's unbiased use of adverse inferences is unsurprising. In short, the cumulative effect of massive production burdens and political pressure is a situation in which the potential for abuse of discretion is very real.

Despite this potential for abuse, Commerce, under *Chevron* and administrative law provisions that largely mirror those in the Administrative Procedure Act ("APA"), is afforded a tremendous amount of deference from the federal courts tasked to review their adjudicative decision-making—deference to which other decision-makers applying adverse inferences are not necessarily entitled.²⁹ However, as both U.S. courts and the WTO have made clear, Commerce's power to use AFA is not

27. See Antidumping Manual, *supra* note 10, at 17.

28. See Edwin Vermulst, THE WTO ANTI-DUMPING AGREEMENT: A COMMENTARY 47 (2005).

29. See, e.g., *Apex Frozen Foods Private Limited v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017) ("Our review of [Commerce]'s interpretation and implementation of a statutory scheme is governed by the Supreme Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, [467 U.S. 837 (1984)]."). This deference also extends to Commerce's "selection and development of methodologies." See *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999). The standard of review applied to dumping and subsidies determinations is the same as that in the APA—determinations are ruled unlawful if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if "unsupported by substantial evidence on the record," understood as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See 19 U.S.C. § 1516a(b)(1) (2017); *Atl. Sugar, Ltd. v. United States*, 742 F.2d 1556, 1559-62 (Fed. Cir. 1984).

unlimited. First, there are limits on *when* Commerce can apply AFA, namely that Commerce must establish that a respondent has actually failed to cooperate. Second, there are limits on *how* Commerce applies AFA, namely on the types of information that Commerce uses to replace the information that is missing and the manner in which it goes about doing so. Although an increasingly protectionist Congress rolled back some these judicially-imposed limits in the 2015 Trade Preferences Extension Act (“TPEA”), some remain in firmly place.³⁰ Yet also preserved, if not enhanced, is Commerce’s discretion “to ensure that the result is sufficiency adverse ‘as to effectuate the statutory purposes of the AFA rule to induce respondents to provide [Commerce] with complete and accurate information in a timely manner.’”³¹

II. ARGUMENTS “FOR” AND “AGAINST” AFA

Arguments for and against AFA exist at the familiar poles of administrative efficiency and process. Those who think that Commerce should have a robust and fairly unbounded authority to apply AFA point to the agency’s need to expedite investigations and meet administrative deadlines. In this sense, the argument against greater process, or for even lesser process than currently exists, is rooted in pragmatic arguments centered on the need for trade remedies law to facilitate efficient agency adjudication. In turn, those critics of AFA who seek to curb Commerce’s discretion argue that AFA creates opportunities for Commerce to act arbitrarily. They argue for more process. Thus, the

30. See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, Title V, § 502, 129 Stat. 262 (codified at 19 U.S.C. § 1677e(c)(2)-(d)) [hereinafter Trade Preferences Extension Act of 2015] (a.k.a. the Leveling the Playing Field Act). One particular limit that the TPEA most certainly did rollback, discussed *infra* Part II, is the requirement that Commerce consider a non-cooperative respondent’s “commercial reality.” See *Özdemir Boru San. ve Tic. Ltd. STI v. United States*, 273 F. Supp. 3d 1225, 1248 (Ct. Int’l Trade 2017) (the first AFA case that the CIT considered under the amended statute); see also *Hyundai Steel Co. v. United States*, 279 F. Supp. 3d 1349, 1367 (Ct. Int’l Trade Dec. 27, 2017). The TPEA-amended AFA statute is effective for all Commerce determinations issued on or after Aug. 6, 2015. See Dates of Application of Amendments to the Antidumping and Countervailing Duty Law Made by the Trade Preferences Extension Act, 80 Fed. Reg. 46,793 (Dep’t of Commerce Aug. 16, 2015).

31. *Özdemir*, 273 F. Supp. 3d at 1233; see also H.R. REP. DOC. NO.103-316(1), at 870 (Dec. 18, 1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4199 (“In employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation.”) [hereinafter URAA Statement of Administrative Action]; *F. Ili De Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (“[Congress] intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent’s actual rate, *albeit with some built-in increase intended as a deterrent to non-compliance.*”) (emphasis added).

debate with regard to AFA in dumping and subsidies cases is resonant not only with the general controversy surrounding the application of adverse facts in other contexts but also the inherent tension between efficiency and process common to any question involving evidence-gathering and decision-making.³² This tension is also, of course, a common theme in administrative law.³³ Before determining how best to balance this classic tradeoff between administrative efficiency and process in the context of the AFA debate, it is useful to understand how administrative efficiency and process supply the value-laden rationales for the arguments made on both sides.

A. *The Efficiency Argument for AFA*

Proponents of a robust use of AFA, which include petitioners, their lawyers, and—it is fair to say—Commerce frequently argue that considerable time and resources are spent resolving dumping and subsidies cases in the face of non-cooperation by respondent exporters and producers.³⁴ Often, these proponents point to the already large number of resources that Commerce spends to locate and send questionnaires to respondents, to notify respondents of deficiencies in the information submitted, and to afford respondents multiple chances to correct deficient information.³⁵ Accordingly, there is also a justice argument that accompanies the administrative efficiency argument: lawyers for one

32. See Dale A. Nance, *Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U. L. REV. 1089, 1103-04 (2010). (“Whether within the law or in other contexts, any situation that calls for decision-making under conditions of uncertainty poses two distinct problems. Here, I will call them the ‘evidence search problem’ and the ‘final decision problem.’ First, a decision-maker must decide when she has acquired enough evidence to make the final decision, and, when that has happened, she must make that final decision under the conditions of uncertainty that remain. Both of these problems pose what are essentially problems of practical optimization. In the search context, a bit crudely put, one obtains evidence until the cost of acquisition exceeds the anticipated benefits of the search effort. In the final decision context, also crudely put, one chooses so as to minimize the expected costs of errors, given the remaining uncertainty. When the investigator and the decision-maker are the same person, these two problems may not be conspicuously separated With this in mind, the central problem of adverse inferences comes into relief: they involve a confusion of roles.”).

33. See *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344-45 (Fed. Cir. 2016) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) for the proposition that the Federal Circuit and the CIT have impermissibly grafted procedures onto the AFA statute that have no basis in the text).

34. See, e.g., Kathleen W. Cannon & Benjamin Blase Caryl, *Salvaging Court, Agency, and Private Litigant Resources When Faced with Noncooperative Parties*, 23 TUL. J. INT’L & COMP. L. 301 (2014).

35. *Id.* at 302-03.

petitioners' firm argue that it is not fair for Commerce, the courts, and petitioners "to incur significant time and expense to 'backfill' and compensate for the outright refusal of subject companies to submit information."³⁶

For Commerce and petitioners, incentives matter. In order for dumping and subsidies investigations to work at all, exporters and producers must have some incentive to provide complete and accurate information; otherwise, they would submit only information that is of benefit to them.³⁷ In the instance where respondents do not submit information, Commerce would, of course, be forced to apply FA, turning instead to other information on the record or that may be publicly available. Proponents of AFA, therefore, point sensibly to the possibility that without AFA respondents would—rather than submit all information relevant to the investigation—choose not to cooperate and force Commerce to resort to facts otherwise available. A simple example: if a respondent knows that certain of its home market sales are particularly high and would drive up its dumping margin it might—rather than submit all of its home market sales—submit only a subset in hopes that Commerce would replace those sales with the average of the home market sales it did report. Therefore, without AFA, argue Commerce and petitioners, dumping and subsidies determinations would not be accurate reflections of real levels of dumping or subsidization but rather the logical results of a self-interested calculus. Relatedly, respondents may be incentivized not to submit any information and later claim foul in court, as it may be the rates of those respondents that voluntarily submitted information, and which presumably will receive lower rates, to which courts will look when reviewing an AFA rate.³⁸ Because the rates calculated for one respondent are "not necessarily indicative" of the rate calculated for another, as reflected by the sometimes vast differences in rates assigned to two cooperative respondents in the same investigation, this practice is loath to petitioners and their lawyers.³⁹

36. *Id.* at 302.

37. *Id.* at 305.

38. *See, e.g., Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 163 F. Supp. 3d 1313, 1326 (Ct. Int'l Trade 2016) (finding an AFA rate determined "on the history of two different respondents," one cooperative and one non-cooperative, to better reflect "commercial reality" than an AFA rate that does not consider the data provided by cooperative respondents). This tendency to look to the rates of "similarly-sized and similarly-situated" cooperative respondents as better reflecting the "commercial reality" of the non-cooperative respondents has its roots in *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010), which was overruled by the TPEA.

39. Cannon & Caryl, *supra* note 34, at 315-16.

This rationale of preventing the non-cooperative respondent from gaining the fruits of their non-cooperation is also advanced by Congress and the courts. According to the URAA Statement of Administrative Action (“SAA”) that accompanied Congress’s implementation of the Uruguay Round Agreements, which include the Anti-Dumping Agreement (“AD Agreement”) and Subsidies and Countervailing Measures Agreement (“SCM Agreement”), the purpose of Commerce’s authority to use AFA is to provide a disincentive for parties to hold out in order to “obtain a more favorable result by failing to cooperate.”⁴⁰ Indeed, according to the SAA, “in employing adverse inferences, one factor [Commerce] will consider is the extent to which a party may benefit from its own lack of cooperation.”⁴¹ Although finding that rates should not be punitive, the Federal Circuit recognized this purpose when it ruled that an AFA rate must be “a reasonably accurate estimate of the respondent’s actual rate, *albeit with some built-in increase intended as a deterrent for non-compliance.*”⁴² Non-compliance, of course, also includes fraud, the most egregious of all acts of bad faith, against which AFA also provides a powerful disincentive.⁴³

Forced to defend the sometimes very high margins in which AFA results, proponents of Commerce’s robust use of AFA argue that oftentimes the AFA dumping or subsidy rate is, in reality, not that much higher, if higher at all, than the dumping or subsidy rate assigned to cooperative respondents.⁴⁴ Just because a rate calculated using AFA may be over 100%, the mere fact that the rate is over 100% is not sufficient to conclude that it is not reflective of commercial reality when indeed there are companies that, when analyzed on their own data, would be found to deserve margins over 100%.⁴⁵ To this end, proponents point to cases such as that involving respondent Bestpak where Commerce

40. URAA Statement of Administrative Action, *supra* note 31, at 4199.

41. *Id.*

42. *F. Ili De Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (emphasis added).

43. *See, e.g., Papierfabrik August Koehler SE v. United States*, 7 F. Supp. 3d 1304, 1313-14 (Ct. Int’l Trade 2014) (justifying use of total AFA where a respondent made “a material omission” that petitioners alleged to be fraud and which Commerce found to have “undermin[ed] the credibility and reliability of Koehler’s data overall.”).

44. *See Cannon & Caryl, supra* note 34, at 310-11 (providing two examples of where Commerce has calculated dumping rates well-over 100% for respondents that submitted their own data).

45. *See id.*; *see also* *Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 41,808 (Dep’t of Commerce July 19, 2010); *see also* *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Narrow Woven Ribbons with Woven Selvedge from the*

assigned a cooperative respondent the all-others rate of 123.83%, which was calculated by averaging a *de minimis* rate it had assigned to a cooperative respondent and a 247.65% rate it had calculated using AFA.⁴⁶ Bestpak successfully challenged the rate at the Court of International Trade (“CIT”) and Federal Circuit, the latter of which, after much effort spent in litigation, eventually vacated the 123.83% rate, forcing Commerce’s hand to calculate a rate for Bestpak using its own data.⁴⁷ However, given the opportunity to have Commerce review it individually and assign it a lower rate based on its own data, Bestpak withdrew from review and “conced[ed] that all its entries would be covered by the 123.83% separate rate.”⁴⁸ *Bestpak*, therefore, may be held out as an example of respondents gaming the system, claiming foul in court only to renege on the opportunity to have Commerce consider their actual data when given the chance.

Proponents of AFA are also placed in the position to defend the collateral impact of AFA rates on 1) cooperative respondents assigned “all-others” rates (like in *Bestpak*);⁴⁹ 2) cooperative respondents in subsidies investigations that receive AFA rates due, not to their failure to cooperate, but rather to their government’s failure to cooperate; and 3) importers. As to the first, not all respondents are mandatory respondents, as Commerce does not have the resources to evaluate all exporters and producers in a given investigation.⁵⁰ Instead, Commerce selects a

People’s Republic of China, at 18-20 (July 12, 2010), <https://enforcement.trade.gov/frn/summary/PRC/2010-17541-1.pdf>.

46. See Cannon & Caryl, *supra* note 34, at 311-12; Yangzhou Bestpak Gifts & Crafts Co. v. United States (*Bestpak I*), 783 F. Supp.2d 1343, 1347 (Ct. Int’l Trade 2011).

47. *Bestpak I*, 783 F. Supp.2d at 1353 (instructing Commerce to either “more thoroughly explain whether the separate rate reasonably reflects Bestpak’s potential dumping margins” or calculate a different rate); Yangzhou Bestpak Gifts & Crafts Co. v. United States (*Bestpak II*), 716 F.3d 1370, 1380 (Fed. Cir. 2013) (vacating the 123.83% rate), *rev’g* 825 F. Supp. 2d 1326, 1353 (Ct. Int’l Trade 2012) (accepting Commerce’s reasons for assigning Bestpak the 123.83% rate).

48. See *Hubscher Ribbon Corp. v. United States*, 979 F. Supp.2d 1360, 1363-64 (Ct. Int’l Trade 2014) (“One wonders what Bestpak’s actual rate and commercial reality would have been had Commerce completed the individual review. Would it have been higher than 123.83%? In any event, though seemingly struck down by the Federal Circuit as unreasonable, the 123.83% separate rate now appears to have regained some validity.”) (discussing respondent Bestpak’s decision not to be individually examined).

49. *Bestpak I*, 783 F. Supp.2d 1342; *Bestpak II*, 716 F.3d 1370.

50. See 19 U.S.C. § 1677f-1(c)(2)(B) (providing that Commerce when confronted with the burden of examining a large number of exporters or producers involved may limit investigations or reviews to a statistically valid sample or the two exporters and producers accounting for the largest volume of imports). Nonetheless, if respondents voluntarily request to be reviewed, Commerce must grant their request unless “the number of exporters and producers . . . is not so large that individual examination . . . would be unduly burdensome and inhibit the timely

limited number of respondents (often just the two largest exporters) and sets an “all-others” rate that is a weighted-average of the dumping or subsidy margin assigned to the mandatory respondents.⁵¹ When Commerce does this, it excludes *de minimis* and AFA margins, *i.e.* if one respondent is *de minimis* and the other respondent is assigned a margin of 36%, then the “all-others” rate is 36%.⁵² If there is no rate calculated for a mandatory respondent that is neither *de minimis* nor based on AFA, then the statute directs Commerce to “use any reasonable method” to establish the rate.⁵³ *Bestpak* is one in a line of cases on this subject.⁵⁴ Although it may seem unfair for a cooperative respondent’s rate to be affected by the AFA rate of a non-cooperative respondent, *Bestpak* provides ammunition to argue that an AFA-based rate may be accurate in many cases (as it supposedly was in *Bestpak*).⁵⁵ Further, in subsidies cases, AFA rates that are felt by several exporters regardless of

completion of the investigation” See 19 U.S.C. § 1677m(a) (2017); *Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States (Grobest I)*, 815 F. Supp.2d 1342, 1361-64 (Ct. Int’l Trade 2012) (rejecting Commerce’s interpretation of § 1577m(a) as giving it merely the discretion to review voluntary respondents once making a decision to sample under its § 1677f-1 authority).

51. See 19 U.S.C. §§ 1671d(c)(5)(A), 1673d(c)(5)(A) (2017). In addition, in NME cases, Commerce will also calculate a country-wide entity rate that applies to all exporters and producers who do not rebut a presumption of government control. See 19 U.S.C. § 1677(18). In these cases, there are essentially two “all-others” rates: one which is applied to exporters that demonstrate lack of government control (known as “separate rate” respondents) and another for exporters and producers that do not make this showing (the country-wide entity rate). As the country-wide entity rate is almost always based on AFA, the question has emerged as to whether it is legal to apply this AFA rate to cooperative respondents who have nonetheless failed to demonstrate a lack of government control. See *East Sea Seafoods LLC v. United States*, 703 F. Supp. 2d 1336, 1354 n.15 (Ct. Int’l Trade 2010) (“It seems that the application of an antidumping duty rate that has been based on AFA to certain companies by the operation of a ‘rebuttable presumption’ of government-control, without the finding of failure to cooperate required by 1677e(b), may be *ultra vires*.”)

52. See *East Sea Seafoods*, 703 F. Supp. 2d at 1354 n.15. A *de minimis* rate in an antidumping investigation is a dumping margin of less than 2% *ad valorem*; in a subsidies investigation, it is a countervailable subsidy rate of less than 1% *ad valorem*. 19 U.S.C. § 1671b(b)(4); 19 U.S.C. §§ 1671b(b)(4), 1673b(b)(3) (2017). The exclusion of *de minimis* and FA/AFA margins when sampling is actually explicitly provided for in the AD Agreement. See AD Agreement, *supra* note 6, art. 9.4.

53. 19 U.S.C. §§ 1671d(c)(5)(A)(ii), 1673d(c)(5)(B) (2017).

54. Although this article does not discuss this distinct line of cases which deal with cooperative respondents, these cases involve several of the same procedural protections that have been extended to non-cooperative respondents. See, *e.g.*, *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367 (Fed. Cir. 2012); *Albemarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016); *Mueller Comercial de Mexico v. United States*, 753 F.3d 1227, 1230 (Fed. Cir. 2014).

55. *Compare Changzhou Wujin Fine Chemical Factory*, 701 F.3d at 1378-79 (rejecting Commerce’s application of separate rate all-others rate that was the average of a *de minimis* rate and a

cooperation with Commerce may incentivize governments to cooperate in order to prevent harm to the overall industry.⁵⁶

As to cooperative respondents in subsidies investigations that are impacted by the failure of their governments to cooperate, the result is inevitable, if not understandable, because companies (not governments) are subject to antidumping and countervailing duties. Though it may seem unfair that a company falls subject to an AFA rate due to failure beyond their control, in subsidies investigations the government is often the only party that can provide Commerce the information necessary to determine if a subsidy is countervailable.⁵⁷ In subsidies investigations, when AFA is applied due to government non-cooperation, it is usually to find programs to provide countervailable subsidies. In contrast, when it is applied to company respondents, AFA usually results in finding that the respondent used the program. That said, a government's failure to submit information that Commerce considers necessary to finding whether or not a program confers a financial contribution and is specific will often collaterally impact the cooperative company respondent.

The collateral impact on importers is justified on similar grounds. While it may seem unfair that importers may ultimately bear the cost of a respondent's cooperation because, in many cases, it is ultimately the importer that pays the duties, the fact that importers are collaterally impacted by respondents' non-cooperation serves important policy ends because "in the aggregate . . . the importers' exposure to enhanced antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal or doing so indirectly, by leaving non-cooperative exporters without importing partners who are willing to deal in their products."⁵⁸ It could, therefore, have the positive, albeit roundabout,

hypothetical AFA rate because the AFA rate only impacted cooperating respondents, thereby having no deterrent value).

56. See *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014). This is especially the case when the mandatory respondents under investigation comprise only a small percentage of the investigated industry since a greater percentage of the industry would therefore be subject to the "all-others" rate.

57. See *RZBC Group Shareholding Co., Ltd. v. United States*, 38 I.T.R.D. (BNA) 1418, 2016 WL 3880773 at *2 (Ct. Int'l Trade 2016) (holding that while company respondents may be collaterally affected by a foreign government's failure to cooperate, Commerce must strive to avoid such effect by examining the record).

58. See *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010) *rev'g* 704 F. Supp.2d 1323 (Ct. Int'l Trade 2010). In *KYD*, Commerce denied an importer's request for a specific-importer assessment rate after it had applied an AFA rate to the exporter based on the much higher

impact of deterring noncompliance and encouraging cooperation.⁵⁹

In short, for proponents of AFA, it is all about incentives. AFA is necessary to compel production and deter bad behavior. Further, if Commerce were to be required to administer more procedures, such as procedures that would require Commerce to offer more opportunities to respondents to provide requested information when they fail to do so the first time or procedures that would require Commerce to apply rates that are more accurate reflections of respondents' actual rates of dumping or subsidization, administrative efficiency would be lost. For them, more procedures waste valuable resources on undeserving actors (many of which are very likely dumping or receiving subsidies—why else would they not cooperate?) that are ultimately to blame for their own failure to cooperate.

B. *The Process Argument Against AFA*

Critics of Commerce's use of AFA prefer to curb what they see as a tool that lends itself to abuses of discretion and a disproportionate favoring of petitioners by enhancing procedural protections and expanding judicial review.⁶⁰ These critics focus on the significant costs respondents face when responding to very long and detailed questionnaires and very tight deadlines, which may prove especially burdensome for smaller and less sophisticated exporters and producers.⁶¹ Whereas petitioners have weeks if not months to gather data and prepare their petition, respondents have only a few weeks to file their

transaction-specific rate between the exporter and another importer. See *KYD, Inc. v. United States*, 704 F. Supp. 2d 1323, 1326 (Ct. Int'l Trade 2010). Rebuffing Commerce, the CIT had ordered Commerce to either calculate an importer-specific assessment rate or explain why it could decline to do so. See *id.* at 1334.

59. Compare *Changzhou Wujin Fine Chemical Factory*, 701 F.3d at 1378-79 (rejecting Commerce's application of separate rate all-others rate that was the average of a *de minimis* rate and a hypothetical AFA rate because the AFA rate only impacted cooperating respondents, thereby having no deterrent value).

60. See, e.g., Craig A. Lewis, Jonathan T. Stoel & Brian S. Janovitz, *The United States Court of International Trade in 2010: Is Commerce Suffering from Adverse Decisions It Wasn't Double-Counting On?*, 43 GEO. J. INT'L L. 47, 52 (2011).

61. See, e.g., Mark K. Neville, Jr., *Trade Remedy Statutes: Be Careful What You Wish For*, 26 J. INT'L TAX'N 26, 27 (2015) (describing the process one faces when selected as a mandatory respondent in a dumping or subsidies case as one "fraught with considerable costs for the producer or importer that may be measured in management time devoted to this distraction, interruptions, and attention diverted from business goals and professional fees. The process has been termed procrustean, with the numerous deadlines strictly enforced.").

responses.⁶² A common view from a respondents' attorney: the sheer amount of information to be collected, often from different sources and in forms in which respondents are often not used to providing information,⁶³ combined with the tight deadlines, mean respondents are inevitably bound to make mistakes, even if inadvertent, and thereby provide opportunities to Commerce to apply AFA in order to inflate margins. Further, while petitioners tend to argue that respondents will, upon the filing of a dumping or subsidies petition, often perform a quick calculation estimating the dumping margin they would likely face if they submitted information to Commerce, respondents argue that the calculus actually performed is whether the legal and managerial costs that would be incurred producing the information are worth avoiding the duty.⁶⁴

One particular case to which critics point as illustrative of both the high burden that respondents face and the often inapposite AFA rates they are assigned when found non-cooperative involves Grobest, a Vietnamese shrimp exporter that after years of fighting for its own rate ended up with a rate higher than that it had been assigned.⁶⁵ Grobest had participated in the second and third administrative review and

62. According to Commerce's Antidumping Manual, "Typically, in investigations and reviews, respondents are given 21 days from the issuance of the questionnaire to complete Section A and 37 days from the issuance for the remainder. Extensions are usually granted for no more than 14 days." Antidumping Manual, *supra* note 10, at Ch. 4, 17.

63. One particularly difficult task for many respondents in antidumping investigations is reporting sales and cost data in the databases that Commerce requires the information to be submitted. Further, much of what Commerce considers selling expenses (packing, warehousing, warranties, etc.) many companies may not track in their accounting records in such a way that they can easily be allocated over sales. As accounting records are often not readily translatable in the form in which Commerce requests them, this increases the costs of compliance and the potential for mistakes, especially for small and medium-sized companies that lack resources and may face considerable foreign language barriers, rely on less sophisticated accounting software, and in general, have less sophisticated accounting practices.

64. See Tomer Broude and Michael Moore, *US – Anti-Dumping Measures on Certain Shrimp from Viet Nam: A Stir Fry of Seafood, Statistics, and Lacunae*, 12 WORLD TRADE REV. 433, (2013) (noting how the considerable discretion Commerce exercises in shaping questionnaires, setting deadlines, and deciding to apply AFA when respondents come up short may result in some respondent choosing not to participate, which, in turn, could result in sample-selection bias).

65. See Neville, *supra* note 61, at 27-29; Final Results of Re-Conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. and Intent Not to Revoke; 2008-2009, 79 Fed. Reg. 15,309 (Dep't of Commerce Mar. 19, 2014); see also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Re-Conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. (Mar. 13, 2014), <https://enforcement.trade.gov/frn/summary/vietnam/2014-06080-1.pdf>.

received *de minimis* dumping margins based on its own data in both.⁶⁶ In the fourth administrative review, Grobest, tired of the continued burden of participating in multiple reviews after having twice received *de minimis* margins, sought revocation of the dumping order in order to escape it altogether.⁶⁷ Refusing to grant its request for revocation, Commerce instead assigned it the “all-others” rate of 4.27%.⁶⁸ Understandably disgruntled with being subject to antidumping duties when it had twice been individually investigated and been under *de minimis* both times, Grobest successfully challenged Commerce’s decision not to review it as a mandatory respondent and subject it to the 4.27% weighted average.⁶⁹

More than two years after the final results of the fourth administrative review, during which Grobest had changed ownership, Commerce commenced an individual review, at which point Grobest decided to request Commerce’s permission to withdraw from administrative review citing “significant management, personnel, and accounting changes” that had since made the “administrative and legal costs” of individual examination more than the company wished to incur.⁷⁰ Commerce denied this request as untimely.⁷¹ After Grobest failed to

66. See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 Fed. Reg. 52,273 (Dep’t of Commerce Sept. 9, 2008) (second review); see also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 Fed. Reg. 47,191 (Dep’t of Commerce Sept. 15, 2009) (third review).

67. See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 Fed. Reg. 47,771 (Dep’t of Commerce Aug. 9, 2010); Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of 2008–2009 Administrative Review, at 15-17 (Jul. 30, 2010), <https://enforcement.trade.gov/frn/summary/VIETNAM/2010-19448-1.pdf>.

68. See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 Fed. Reg. 47,771 (Dep’t of Commerce Aug. 9, 2010).

69. See *Grobest I*, 815 F. Supp.2d at 1348 (first remand); *Grobest & I-Mei Indus. (Vietnam) Co. v. United States (Grobest II)*, 853 F. Supp.2d 1352, 1365 (Ct. Int’l Trade 2012) (second remand).

70. *Viet I-Mei Frozen Foods Co. v. United States (Grobest III)*, 83 F. Supp.3d 1345, 1351 (Ct. Int’l Trade 2015).

71. Final Results of Re-Conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. and Intent Not to Revoke; 2008-2009, 79 Fed. Reg. 15,309 (Dep’t of Commerce Mar. 19, 2014); see also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Re-Conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. 3 (Mar. 13, 2014), <https://enforcement.trade.gov/frn/summary/vietnam/2014-06080-1.pdf>

respond to a supplemental questionnaire requiring it to address certain deficiencies in the original questionnaire that it had submitted two years prior before the change in ownership.⁷² When Grobest failed to do so, Commerce applied an AFA rate of 25.76%, the highest margin it had calculated in a prior segment of the investigation despite the fact that in two prior administrative reviews it had been *de minimis*.⁷³ The CIT affirmed Commerce's determination, concluding that Grobest had made a "conscious decision not to incur the costs of cooperating with Commerce's examination" and that Commerce was not required to withdraw Grobest's request.⁷⁴ Ultimately, Grobest went from the 0% rate it had been assigned in the first and second administrative reviews, to the 4.29% all-other separate rate respondents in the third administrative review, to a Vietnam-wide rate of 25.76%.⁷⁵ *Grobest* illustrates two frequent complaints launched by AFA critics: 1) that the costs that exporters are required to incur when responding to Commerce's questionnaires may simply not be worth the benefit of escaping a higher rate; and 2) that AFA rates often bear questionable relation to a respondent's actual rate of dumping or subsidization and that, far too often, better evidence (*e.g.*, the *de minimis* margin calculated on Grobest's own data) is often ignored.⁷⁶

Proponents for greater procedural protections when it comes to application of AFA in dumping and subsidies investigations also frequently point to the unfair collateral effect of AFA on cooperative respondents discussed *supra*.⁷⁷ With regard to cooperative exporters and producers subject to the "all-others" rate, one recent case is particularly illustrative of the ripple effects of AFA findings. In the 2016-2017 antidumping review of *Certain Oil Country Tubular Goods from the Republic of Korea*, Commerce calculated an all-others rate of 16.26%, a weighted-

(finding that the deadline for Grobest to have withdrawn its request was in 2009, 90 days from publication of the notice of initiation; not 2012, 90 days after the final judgment that ordered Commerce to conduct the individual review).

72. *Grobest III*, 83 F. Supp.3d at 1352.

73. See *id.* at 1354. For a discussion of the first point, see also Michael O. Moore & Alan K. Fox, *Why Don't Foreign Firms Cooperate in U.S. Antidumping Investigations?: An Empirical Analysis*, 145 REV. WORLD ECON. 597 (2010).

74. *Grobest III*, 83 F. Supp.3d at 1361.

75. *Id.* at 1348-54.

76. It also evidences that the years that may pass in order to secure individual review might raise costs over what they would have been if Commerce had performed a review in the first place—and, if Grobest is to be taken at its word, even render review infeasible to perform.

77. *Supra* Part II.A.

average of the two cooperative mandatory respondents in the review.⁷⁸ However, to calculate the dumping margins for mandatory respondents, Commerce used a prior AFA finding in a subsidy investigation that it had made against a company that supplied both mandatory respondents' hot-rolled steel coil to conduct a particular market situation analysis and increase the mandatory respondents' hot-rolled steel coil cost.⁷⁹ This AFA finding was used to quantify a particular market situation despite the fact that, in Commerce's own words, the rate was based on total AFA because Commerce has been deprived of "complete, accurate, and reliable data [such that] the Department cannot accurately calculate [the supplier's] CVD subsidy rate."⁸⁰ In so doing, the cooperative non-examined companies were affected by an AFA finding from which they were two degrees separated, *i.e.* the AFA finding made against the supplier was imputed to the mandatory respondents, and then, once more, to the non-examined companies subject to the all-others rate. This tendency of AFA findings to bleed into other proceedings and affect cooperative respondents is becoming increasingly commonplace and belies Commerce's commitment to "accuracy and fairness," which according to the Federal Circuit, "must be Commerce's primary objectives in calculating a separate [*i.e.*, "all-others"] rate for cooperating exporters."⁸¹

In short, critics of AFA see enhanced procedural safeguards as a means to check what they see as Commerce's overzealous use of AFA. Enhanced procedures, these critics argue, would curb Commerce's discretion to find a respondent non-cooperative for minor deficiencies. They could also curb Commerce's discretion in selecting the facts used

78. The mandatory respondents received rates of 29.76% and 2.76%. See *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (amended in *Certain Oil Country Tubular Goods from the Republic of Korea: Amended Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 Fed. Reg. 31,750 (Dep't Commerce July 10, 2017)); Issues and Decision Memorandum for the Final Results of the 2014-2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (Apr. 10, 2017), <https://enforcement.trade.gov/frn/summary/korea-south/2017-07684-1.pdf> [hereinafter *OCTG from Korea Final IDM*].

79. See *OCTG from Korea Final IDM*, at 43.

80. See *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders*, 81 Fed. Reg. 67,960 (Dep't Commerce Oct. 3, 2016) [hereinafter *HR Amended Final Results*]; Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea, at 61 (Aug. 4, 2016), <https://enforcement.trade.gov/frn/summary/korea-south/2016-19377-1.pdf>.

81. *Albemarle Corp. v. United States*, 821 F.3d 1345, 1354 (Fed. Cir. 2016).

to draw adverse inferences, and thus, ultimately, the AFA rate. Rather than Commerce throwing out the proverbial baby with the bathwater whenever a respondent is found non-cooperative—or, as the CIT recently put it, “throw its hands in the air”—greater procedures could require Commerce to more carefully examine the record when selecting among facts available, tying the AFA rate to the information that is on the record, and to explain why the adverse inference is needed to deter non-compliance.⁸² In the absence of more procedures, respondents will continue to advocate for increased judicial scrutiny of agency fact-finding and reasoning.

III. JUDICIAL REVIEW OF COMMERCE’S USE OF AFA IN U.S. COURTS: LIMITS ON WHEN AND HOW AFA MAY BE APPLIED

Although Congress has given Commerce considerable discretion to apply AFA in dumping and subsidies cases, the CIT and the Federal Circuit have made clear that Commerce’s discretion is not unbounded.⁸³ Indeed, in the years following the United States’ implementation of the Uruguay Round through passage of the Uruguay Round Agreement Act (“URAA”), which implemented the AD and SCM Agreements, up through passage of the TPEA, U.S. courts had begun to more vigorously exercise their authority to review Commerce’s application of AFA, finding several of Commerce’s determinations of dumping and subsidies duties in which AFA was used to be unsupported by substantial evidence on the record.⁸⁴ The two principal sets of challenges to Commerce’s use of AFA have been to 1) Commerce’s determination

82. See *Tai Shan City Kam Kiu Aluminum Extrusion Co. Ltd. v. United States (Kam Kiu I)*, 58 F. Supp.3d 1384, 1395-96 (Ct. Int’l Trade 2015).

83. The CIT is a specialized Article III court with exclusive jurisdiction over trade and customs issues, including antidumping and countervailing duty determinations issued by Commerce. See 28 U.S.C. §§ 1581(c), 1516a(a) (2017). The CIT’s decisions are subject to the review of the Federal Circuit. 28 U.S.C. § 1295(a)(6) (2017).

84. The standard of review applied to dumping and subsidies determinations on the record is substantial evidence of review understood as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” See 19 U.S.C. § 1516a(b)(1)(B)(i) (2017); *Atl. Sugar, Ltd. v. United States*, 742 F.2d 1556, 1559-62 (Fed. Cir. 1984). Commerce’s interpretations of statutes are accorded *Chevron* deference. *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009). Its reasoning is reviewed under the same “arbitrary and capricious” standard as that of other agencies subject to the APA. See 19 U.S.C. § 1516a(b)(1)(B)(ii) (2017). When the Federal Circuit reviews decisions of the CIT, it reviews *de novo*, though “giv[ing] great weight to the informed opinion of the [CIT] . . . [which] is nearly always the starting point of [its] analysis.” *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1253 (Fed. Cir. 2009) (quoting *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006)); see *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (“Commerce is the master of the

that a respondent was not cooperative and 2) Commerce's use of evidence to determine the AFA rate. The first set provides limits on *when* Commerce may draw an adverse inference, whereas the second set provides limits on *how* Commerce applies an adverse inference. The following section will address both.

A. *Reviewing Commerce's Finding that a Respondent Was Non-Cooperative*

Commerce may apply AFA only when it "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."⁸⁵ Commerce's regulation simply parrots the statute.⁸⁶ While the statute defines a lack of cooperation as failure to act to the best of one's ability to comply with a request for information, it is not clear from either the statute or Commerce's regulations how to determine whether a respondent has actually acted to the best of one's ability. Because exporters vary in size and sophistication, some will be better suited than others to comply with Commerce's requests for information. Also unclear from the plain language of the statute is whether a respondent has to intend not to cooperate. If intent is not at issue, does any deficiency in responding to Commerce's question count as non-cooperation? In the absence of an intent-based standard, can any mistake or deficiency serve as a basis for applying AFA? Are there any requests for information with which respondents do not have to comply, and how much notice and time must Commerce give respondents so that they can correct a deficiency?

The most instructive case that touches on many of these questions remains the 2003 Federal Circuit opinion in *Nippon Steel Corporation v. United States*, which, far from a lodestar, offers the most guidance for how courts have treated approached issue.⁸⁷ In *Nippon*, the Federal Circuit recognized that while "the statute does not provide an express definition of 'the best of its ability,'" it does mean that a respondent has

antidumping law, and reviewing courts must accord deference to the agency in its selection and development of proper methodologies.") (internal quotation marks omitted).

85. 19 U.S.C. § 1677e(b) (2017). Note that in order to apply facts available at all, including AFA, one of the triggers in § 1677e(a), listed *supra* note 4, must be met. *See, e.g.,* Shandong Huarong Machinery v. United States, 435 F.Supp.2d 1261, 1289 (Ct. Int'l Trade 2006) ("Absent a valid decision to use facts otherwise available, Commerce may not use an adverse inference."). As discussed *supra* Part I, Commerce may apply facts available without a separate finding that a respondent has failed to act to the best of their ability. If Commerce does make this separate finding, then Commerce applies not just facts available, but AFA. *Id.*

86. 19 C.F.R. § 351.308(a) (2017).

87. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

an obligation “to do the *maximum* it is able to do.”⁸⁸ This does not mean that the respondent must perform to “perfection,” but rather that Commerce is required to “examine respondents’ actions and assess the extent of respondents’ abilities, efforts, and cooperation in responding to Commerce’s requests for information.”⁸⁹ Although cases of “deliberate concealment or inaccurate reporting” represent clear cases of a failure to cooperate under *Nippon*, the *Nippon* court also recognized that “mistakes sometimes occur,” which seems to leave some room for respondents to make small errors— “[a]n adverse inference may not be drawn merely from a failure to respond.”⁹⁰ Yet the *Nippon* court makes clear that the standard is an objective one—Commerce may apply AFA “regardless of motion or intent.”⁹¹ Under *Nippon*, what really matters is whether it is “reasonable for Commerce to expect that more forthcoming responses should have been made.”⁹² To that end, Commerce is reasonable not to “condone inattentiveness, carelessness, or inadequate record keeping.”⁹³ It must merely demonstrate that 1) a “reasonable and responsible” respondent would have the requested information at their disposal, and that, 2) the respondent failed to provide the information due to either the exporter or producer’s failure to maintain those records or failure to “put forth maximum efforts to investigate and obtain the requested information.”⁹⁴

Most AFA findings result from failures to provide complete and accurate information. For instance, and increasingly more common, a respondent may make an assertion in a questionnaire that at verification turns out to contain either a commission or omission of error.⁹⁵ If a respondent “fails” verification, AFA is almost certain to result. In other instances, a petitioner may present information to Commerce that contradicts a respondent’s answers and leads Commerce to the conclusion

88. *Id.* at 1382-83 (emphasis added).

89. *Id.* at 1382.

90. *Id.*

91. *Id.* at 1382-83 (rejecting the CIT’s conclusions that Commerce must show that a respondent “made more than ‘a simple mistake’ or exercised a ‘lack of due regard for its responsibilities in the investigation’”).

92. *Id.* at 1383.

93. *Id.* at 1382.

94. *Id.*

95. See *Özdemir Boru San. ve Tic. Ltd. STI v. United States*, 273 F. Supp. 3d 1225, 1235 (Ct. Int’l Trade 2017). For a worthwhile discussion of verification procedures and steps that respondents must take to prepare, see Julie C. Mendoza & Susan M. Crawford, *Surviving Verification: Practical Strategies*, TRADE REMEDIES FOR GLOBAL COMPANIES 51 (eds. Timothy C. Brightbill, Linda S. Chang, and Peggy A. Clarke) (2006).

that the respondent misled it.⁹⁶ Other applications of AFA occur simply because the respondent did not fully respond to Commerce's information request or did not do so by the deadline that Commerce set.⁹⁷ AFA can also be applied when Commerce finds that respondents have avoided providing information or unduly delayed a proceeding.⁹⁸ Even if respondents later offer to provide requested data, failure to do so initially can result in AFA, especially if Commerce may have reason to believe that respondents could have benefitted from the delay.⁹⁹

Yet should all deficiencies serve as a basis for applying AFA? In some cases, a respondent's non-cooperation is much clearer than in other cases. In other words, as in other areas of life, wrong exists on a spectrum. Take, for example, two recent cases both involving misrepresentation. In *Yantai Xinke Steel Structure Co. v. United States*, in response to questions about input suppliers used by a steel producer in a subsidies investigation, respondent Jiulong's senior management produced fabricated mill certificates that the company did not admit to having fabricated until after verification when Commerce became suspicious of their reliability.¹⁰⁰ In the second, *Papierfabrik August Koehler SE v. United States*, respondent Koehler submitted a home market sales database in a dumping review that did not include all of the home market sales that should have been reported, namely sales that the company's senior management learned during the course of the dumping review had

96. See *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp.3d 1313, 1320-21 (Ct. Int'l Trade 2015) (where petitioner raised allegations that respondent had submitted incorrect quantity and value data because the volume of shipments it had submitted were not reported to Chinese customs).

97. See, e.g., *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1378 (Fed. Cir. 2003) (applying AFA because respondent had inexplicably filed conversion factor data three days late).

98. See *Qingdao Taifa Grp. Co., Ltd. v. United States (Taifa I)*, 637 F. Supp.2d 1231, 1239-40 (Ct. Int'l Trade 2009) (where at verification respondent told verifiers that it could not produce certain production records because they were not maintained, only for Commerce to later discover that at least some of the records were, in fact, maintained, and that respondents' employees had deliberately withheld them).

99. See *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306-07 (Fed. Cir. 2014) (finding respondent to have "evaded providing a direct response" when after the preliminary determination respondent offered to provide information it had previously said was not reasonably available) ("Absent the threat of an adverse inference, respondents could sit out the preliminary phase of the investigation and submit requested data only when the resulting preliminary antidumping rates are higher than the rate that would have been established with the withheld data.").

100. *Yantai Xinke Steel Structure Co., Ltd. V. United States*, 2015 WL 5333508, at *3 (Ct. Int'l Trade 2015).

been transshipped to the home market through third countries.¹⁰¹ However, unlike in *Xinke*, where senior management intentionally fabricated information in order to deceive Commerce during an ongoing investigation, in *Koehler* a small number of employees who sought to make sales despite Koehler's antidumping protocol deceived their supervisors and senior management in a scheme that predated the dumping review.¹⁰² Thus, if Koehler is to be taken at its word, when senior management submitted Koehler's home market sales database, it did not know that the database did not contain all sales.¹⁰³

Upon learning of the scheme, Koehler hired outside counsel to investigate the transshipment scheme, admitted to Commerce that some of its employees had knowingly transshipped products that should have been reported in its home market sales database, and attempted to submit a new home market sales database that was included in the unreported transshipped sales in a supplemental questionnaire.¹⁰⁴ Commerce, however, rejected the new database on grounds that it was unreliable due to the prior fraud, assigning Papierfabrik a total AFA rate, a decision that both the CIT and the Federal Circuit affirmed.¹⁰⁵ That senior management did not participate in the scheme was of no matter to either the CIT or the Federal Circuit, the latter opining that "Koehler is responsible for the conduct of its employees and for the responses it provided Commerce. Indeed, Koehler and its outside counsel certified the accuracy and completeness of the original responses. Thus, Commerce was entitled to make

101. See *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1376-77 (Fed. Cir. 2016), cert. denied, 138 S. Ct. 555 (U.S. Dec. 11, 2017) (No. 17-171). Commerce became aware of the transshipment scheme after petitioners filed an affidavit from a confidential source. *Id.* at 1376; see also *Lightweight Thermal Paper From Germany: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 Fed. Reg. 23,220 (Dep't Commerce Apr. 18, 2013); Issues and Decision Memorandum for the Final Results of the 2010-2011 Administrative Review on Lightweight Thermal Paper from Germany, at 2-14 (Apr. 10, 2013), <https://enforcement.trade.gov/frn/summary/germany/2014-14243-1.pdf> [hereinafter *Lightweight Thermal Paper Final IDM*].

102. See Corrected Non Confidential Brief for Appellant, *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373 (Fed. Cir. 2016) (No. 15-1489), 2015 WL 12696226, at *6-7.

103. See *id.* at *4-5 (asserting that Koehler senior management did not become aware of the scheme until Commerce had, which was, see *supra* note 97, at the time petitioners filed their confidential source affidavit).

104. Koehler also disciplined and/or terminated some of its employees who had "developed and directed the sales strategy that resulted in the underreporting"; enhanced its internal controls, including employee training; and taken steps to conduct additional controls and checks for data submission. *Id.* at 6-7.

105. *Koehler*, 843 F.3d at 1378-80; *Papierfabrik August Koehler SE v. United States*, 7 F. Supp.3d 1304, 1310-1311 (Ct. Int'l Trade 2014).

adverse inferences.”¹⁰⁶ For the Federal Circuit, all that seemed to matter with regard to 19 U.S.C. § 1677e(b) was that the response was inaccurate and incomplete. Senior management’s knowledge of that incompleteness did not enter the picture. Although reasonable minds can disagree as to whether it was appropriate to find Koehler non-cooperative and assign it total AFA, the misrepresentation that occurred—if Papierfabrik is to be taken at its word—is clearly less egregious than the misrepresentation in the first case which was a clearly intentional and direct effort to mislead Commerce after a dumping investigation had been commenced.

As deficiencies involve varying degrees of offensiveness, the question must be asked if all deficiencies, regardless of either intention or materiality (*i.e.*, the gravity of the mistake and its impact on the result), should be the basis for finding a respondent non-cooperative.¹⁰⁷ Under *Nippon*, the answer seems to be “no.” Neither intention nor the materiality of the deficiency matter so long as Commerce demonstrates that a “reasonable and responsible” importer would have maintained the information requested and that the respondent failed to provide the information. Yet this has not stopped courts from discussing intentionality and the materiality of the offense.¹⁰⁸ For instance, in *Papierfabrik*, it was important for the Federal Circuit that the respondent has “*intentionally* submitted *materially* false responses.”¹⁰⁹ The mistake was not “inadvertent.”¹¹⁰ And according to one recent CIT case, *Changzhou Trina Solar Energy Co., Ltd. v. United States* (“*Trina Solar*”), the AFA statute “does not support the use of AFA on the basis of an

106. *Papierfabrik August Koehler SE*, 843 F.3d at 1379.

107. A separate but related question also emerges—even if any deficiency is enough to be used as a basis for finding a respondent non-cooperative, might the nature of the offense matter in terms of the AFA rate that is applied, *e.g.* whether to apply partial or total AFA? For instance, in cases of fraud, where misrepresentation is both intentional and material, Commerce can determine that the entirety of the data that the respondent submitted is no longer “reliable or usable.” *See, e.g., id.* at 1379-80.

108. *Nippon Steel*, 337 F.3d at 1381-83.

109. *Papierfabrik Aug. Koehler SE*, 843 F.3d at 1379 (emphasis added). The Federal Circuit also discusses intentionality in the context of Commerce’s obligation under 1677m(d), discussed *infra*, to issue deficiency notices. *Papierfabrik Aug. Koehler SE*, 843 F.3d at 1384 (“But nothing in that language compels Commerce to treat *intentionally* incomplete data as a “deficiency” and then to give a party that has *intentionally* submitted incomplete data an opportunity to ‘remedy’ as well as to ‘explain.’”).

110. *See Lightweight Thermal Paper Final IDM*, *supra* note 101, at 9 (contrasting Koehler’s mistake to the inadvertent omission of sales due to an unintentional computer programming error that generated an incomplete home market sales database).

inadvertent failure to cooperate.”¹¹¹

The notion that inadvertent mistakes cannot serve as the basis for non-cooperation is grounded in statute and case law. Under 19 U.S.C. §1677m(e), Commerce is required to accept information from respondents that have acted to the best of their ability so long as the information is timely submitted, verifiable, “not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,” and “can be used without undue difficulties.” In *NTN Bearing Corp. v. United States*, the Federal Circuit interpreted 19 U.S.C. § 1677m(e) to find that Commerce cannot deny respondents the opportunity to correct clerical errors, which “are by their nature not errors in judgement but merely inadvertencies,” where the correction does not require “beginning anew” or result in “delay[] making the final determination.”¹¹² Although Commerce may argue that 19 U.S.C. § 1677m(e) only applies when respondents have acted to the best of their ability, to the extent that such an argument does not consider the inadvertency of the mistake it effectively renders 19 U.S.C. § 1677m(e) and *NTN* null. Even under *Nippon*, which, as discussed *supra*, makes clear that the standard to which respondents are to be held is not that of perfection,¹¹³ there is at least some room for innocent reporting mistakes and *pecadillos*. Further, following *NTN*, for some time Commerce adjudged it to be within its power to draw a distinction between “clerical” errors and other errors it deemed more substantive, *i.e.*, errors in methodology or judgment.¹¹⁴ However, as the Federal Circuit articulated in *Timken U.S. Corp. v. United States*, Commerce does not have the authority to limit respondents’ correction of errors only to those that Commerce deems “clerical” in nature but rather must evaluate the nature of respondents’ mistakes.¹¹⁵ Further, courts, in reviewing those decisions, are within their power to find Commerce to have abused its discretion by “balanc[ing] the desire for accuracy . . . with the need for finality at the final results stage.”¹¹⁶ Therefore, any conclusion that a respondent has not

111. *Changzhou Trina Solar Energy Co., Ltd. V. United States*, 195 F. Supp.3d 1334, 1346 (Ct. Int’l Trade 2016) (citing 19 U.S.C. § 1677e(a) (use of facts otherwise available is subject to 19 U.S.C. § 1677m(d)); *id.* § 1677m(d) (requiring Commerce to provide an opportunity to remedy or explain submissions deemed to be deficient); *id.* § 1677e(b)).

112. *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208-09 (Fed. Cir. 1995) (finding that respondents have the right to submit corrections to remedy data entry errors).

113. *See supra* Part III.A.

114. *See Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Administrative Review*, 61 Fed. Reg. 42,833, 42,834, 42,861-42,864 (Dep’t of Commerce Aug. 9, 1996).

115. *See Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1352-54 (Fed. Cir. 2006).

116. *Id.*

acted to the best of its ability must take into account the nature of the mistake, not merely find one to have been made and end the inquiry there.

Yet the CIT, in *Özdemir Boru San ve Ticaret Ltd. Sti. v. United States*, recently rejected respondents' arguments that Commerce must consider the intentionality and materiality of the deficiency.¹¹⁷ In *Özdemir*, a respondent in a subsidies investigation reported that it was not eligible for location-specific benefits because it did not operate a plant in the province extending those benefits; however, at verification Commerce discovered that because the respondent did, in fact, have a plant in this province, it was eligible for benefits after all.¹¹⁸ Respondent *Özdemir* argued that because it had elsewhere in Commerce's questionnaire disclosed the existence of the plant, thereby manifesting its lack of intention to defraud Commerce, that it was improper for Commerce to have found that it did not act to the best of its ability.¹¹⁹ However, citing *Nippon*, the CIT ruled that "*Özdemir's* assertion that it inadvertently provided the incorrect questionnaire statement . . . [did] not advance its argument" because intentionality is irrelevant—what matters is whether the respondent "provide[d] Commerce with full and complete answers to all inquiries."¹²⁰ In the words of the CIT, "while intentional conduct, such as deliberate concealment or inaccurate reporting surely evinces a failure to cooperate, the [AFA] statute does not contain an intent element."¹²¹ Thus, the CIT seemed to reason, to the extent that intentionality may be discussed in some cases, it is with respect to determining whether the entirety of respondents' data should be dismissed as unreliable due to a discovered fraud.¹²² In other words, it is not, however, relevant to the underlying finding that the respondent did not act to the best of its ability.

In addition to intention, respondents also argued that Commerce ought to assess the materiality of the deficiency, namely that the respondent did not actually receive any benefits under an alleged tax program during the period of the investigation ("POI") such that its false statement that it was ineligible for benefits under the program was

117. 273 F. Supp. 3d 1225, 1240 (Ct. Int'l Trade 2017).

118. *Id.* at 1234-35, 1240.

119. *Id.* at 1240.

120. *See id.* at 1241 (citing *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360 (Fed. Cir. 2017)).

121. *Id.* (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003)).

122. *See*, for example, the facts the CIT found relevant in *Koehler*, *supra* note 109, in which the CIT upheld Commerce's application of AFA.

immaterial.¹²³ However, the CIT affirmed Commerce's reasoning that respondent's actual non-use of the program during the POI was immaterial because Commerce had asked the respondent detailed questions about its history with the program, including receipt of benefits in prior years, and had, in turn, been given inaccurate responses because the respondent was eligible for the program and, in fact, in prior years had received benefits.¹²⁴ For the CIT, "[t]he operative point is that [the respondent] possessed information that Commerce requested in its Questionnaire, and upon being asked to provide that information with supportive details and explanations, [] did not provide it."¹²⁵ While there remains tension between notions of inadvertence expressed in cases like *Trina Solar* and the much harder and less forgiving line struck in *Özdemir*, if *Özdemir* is any indication of the direction in which the CIT will veer in the future, then the future for respondents challenging Commerce's non-cooperation findings will be far from hopeful.

Yet it is not as if prior to *Özdemir* the jurisprudence was particularly rosy for respondents challenging Commerce's non-cooperation findings. Since *Nippon*, there have been few AFA cases where either the CIT or the Federal Circuit has reversed Commerce's determination that a respondent did not act to the best of its ability, but, by the same token, the CIT and Federal Circuit have also generally upheld Commerce when it finds that respondents have cooperated to the best of their ability.¹²⁶ That said, there are three principal limits on Commerce's ability to apply AFA on which successful challenges have been made: 1) Commerce must issue deficiency notices as required under 19 U.S.C. § 1677m(d); 2) Commerce must demonstrate that the respondent had the actual ability to comply with Commerce's request; and 3) Commerce must demonstrate that information of which it has been deprived is relevant to the applicable determination.¹²⁷

123. See *Özdemir Boru San ve Ticaret Ltd. Sti. v. United States (Özdemir)*, 1225, 1235, 1240 (Ct. Int'l Trade 2017).

124. *Id.* at 1241.

125. *Id.* at 1242.

126. See, e.g., *Maverick Tube Corp. v. United States*, Court No. 15-00303, Slip Op. 17-146, 2017 WL 4864914, at *15-16 (Ct. Int'l Trade Oct. 27, 2017) (upholding Commerce's decision not to apply AFA with regard to the Government of Korea because it allegedly "did not provide cost data in an electric format, did not make necessary officials available, did not provide electricity generation costs, and . . . provided 'insufficient, incomplete and inconsistent questionnaire responses'").

127. Although the limit as to the relevance of the information requested has been rolled back by the Federal Circuit and the CIT, it is still discussed as it is commonly raised by respondents and as Commerce itself frequently speaks of the relevance or necessity of information in rendering determinations.

1. Deficiency Notices

Any FA or AFA finding made under 19 U.S.C. § 1677e(a) is subject to 19 U.S.C. § 1677m(d), which states that Commerce, after receiving a deficient response, “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 and reviews.” This requirement is basically one of fairness.¹²⁸ If Commerce were allowed to know of a particular mistake or piece of information that was missing that prevented it from performing its analysis only to withhold this knowledge from respondents so that it could apply FA or AFA, then the result would be less accurate than it would have been if this information would have provided otherwise. Additionally, there is a likely benefit to petitioners and domestic industry that would rather have the information replaced using FA or even AFA. Thus the CIT has made clear that Commerce cannot “hide the ball” by making ambiguous requests for information.¹²⁹ For instance, in *Ta Chen Stainless Steel Pipe Ltd. v. United States*, Commerce applied AFA to a respondent in a dumping investigation because the respondent had not provided its affiliates’ sales, information that Commerce required in order to calculate a constructed export price.¹³⁰ However, because Commerce could foresee that this information would be required and because it “did not ask for this information specifically,” Commerce had not provided the respondent adequate notice.¹³¹ In order to put respondents on notice, Commerce must, therefore, ask specific rather than broad questions and notify respondents of *specific* deficiencies that they are able to remedy such that the exact deficiency

128. See *Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1165 (Fed. Cir. 1996) (holding that it was fair to apply FA where respondent understood Commerce’s question but would be unfair otherwise); *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572-75 (Fed. Cir. 1990) (“[Commerce] may not properly conclude that resort to the best information rule is justified in circumstances where a questionnaire is sent and completely answered, just because [Commerce] concludes that the answers do not definitely resolve the overall issue presented. Although [Commerce] may properly request additional supplemental information, if needed, to fully resolve the issue, section 1677e(b) clearly requires *noncompliance with an information request* before resort to the best information rule is justified, whether due to refusal or mere inability.”).

129. *Allegheny Ludlum Corp. v. United States*, 215 F. Supp. 2d 1322, 1339 (Ct. Int’l Trade 2000) (finding that Commerce had not “hidden the ball” where Commerce had requested information related to all market sales and defined this term to include affiliate sales).

130. *Ta Chen Stainless Steel Pipe Ltd. v. United States*, No. 97-08-01344, 1999 WL 1001194 at *12-13 (Ct. Int’l Trade 1999).

131. *Id.*

does not come as a surprise once a determination is issued.¹³² Further, Commerce must, when issuing instructions to respondents, must ensure those instructions are unambiguous and clearly communicate expectations.¹³³ In addition to pointing out specific deficiencies, Commerce must also provide respondents an opportunity to remedy them.¹³⁴

However, challenging the sufficiency of Commerce's notice to respondents is not an easy task. While Commerce is required to ask specific questions, where regulations are cited in Commerce's requests, it is the responsibility of the respondent to consult those regulations so that they are able to understand exactly what Commerce is asking and to ask Commerce if a misunderstanding exists.¹³⁵ Further, before applying FA or AFA, all that is required of Commerce is that it demonstrates that a respondent "had already failed to provide the information requested in [its] original questionnaire, and the supplemental questionnaire notified [the respondent] of that defect. Section 1677m(d) does not require more."¹³⁶ To put it simply, Commerce is required to

132. *See id.* at 13 (citing *Bow-Passat v. United States*, No. 92-01-00058, 1993 WL 179269, at *6-7 (holding that Commerce cannot "sen[d] out a general questionnaire and a brief deficiency letter, then effectively retreat[] into its bureaucratic shell, poised to penalize [respondents] for deficiencies not specified in the letter that the ITA would only disclose after it was too late, *i.e.*, after the preliminary determination. This predatory "gotcha" policy does not promote cooperation or accuracy or reasonable disclosure by cooperating parties intended to result in realistic dumping determinations. Rather, this behavior encourages parties to front-load investigations with all manner of unnecessary information to back up their claims.").

133. *See Shantou Red Garden Foodstuff Co., Ltd. v. United States*, 815 F. Supp. 2d 1311, 1322-25 (Ct. Int'l Trade 2012) (finding that Commerce failed to communicate to respondents a request for it to request factors of production data from the former owners of its suppliers when the current owners communicated that the information was no longer available).

134. Relatedly, Commerce must not promise an opportunity to remedy deficiencies and then not provide it. *See Hyundai Steel Co. v. United States*, 282 F. Supp. 3d 1332, 1348 (Ct. Int'l Trade 2018) (finding Commerce to have acted contrary to § 1677m(d) where it informed respondents of database inconsistencies and a mathematically incorrect methodology for reporting sales quantity in its initial reporting, promised in its preliminary determination to give respondents additional opportunity to make corrections, and then never did so).

135. *See Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part, Countervailing Duty Investigation*, 82 Fed. Reg. 53,473 (Nov. 16, 2017); *Hardwood Plywood Final IDM*, *supra* note 24, cmt. 1, at 26 (rejecting respondents' argument that because they had a different understanding of family affiliation than that contained in Commerce's regulations, they were not on notice to provide Commerce information requested about affiliate companies).

136. *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (citing *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n. 1 (Fed. Cir. 2007) ("Commerce . . . satisfied its obligations under section 1677m(d) when it issued a supplemental questionnaire specifically pointing out and requesting clarification of [the] deficient responses.")).

provide but one deficiency notice—after that, no more are required. And Commerce is, at least in some cases, interpreting § 1677m(d) to require even less. For instance, in Commerce’s recent subsidies investigation of hardwood plywood from China, Commerce concluded that it is not required to issue respondents’ deficiency notices “when a respondent outright refuses to submit requested information” because “further request for that necessary information would be fruitless.”¹³⁷ Such an interpretation, if accepted by the CIT and the Federal Circuit, would hopefully require Commerce to at the very least determine some articulable standard by which to determine whether the respondent has made an “outright refusal,” though whether such a standard could be developed remains to be seen.¹³⁸

Section 1677m(d) has proved particularly ineffective when it comes to verification, over which the CIT and Federal Circuit have afforded Commerce a particularly wide berth when it comes to requesting new information and rejecting it when it is deficient.¹³⁹ For instance, in *Hyundai Steel Co. v. United States*, the CIT recently affirmed Commerce’s rejection of a respondent’s information submitted at verification, asserting that Commerce had no obligation to allow respondent to remedy its deficiency.¹⁴⁰ Here, Commerce had asked respondent Hyundai to provide freight and insurance contracts that its affiliates had with unaffiliated parties to verify that certain transactions between Hyundai and its affiliates were at arm’s length; in turn, Hyundai provided sample contracts in its supplemental questionnaire response which Commerce did not ask more about until verification.¹⁴¹ However, at verification, and despite the fact that a specific request for all such contracts was not made in Commerce’s verification outline, which is typically issued one

137. Hardwood Plywood Final IDM, *supra* note 24, at 71.

138. Although Commerce characterized the Government of China’s (“GOC”) failure to provide the internal regulations it sought as an “outright refusal,” examination of the record reveals that refusal was not quite so clear. In fact, the GOC stated that it could not procure the requested regulation because it was issued by the China EXIM Bank, a separate private entity over which the GOC purported it had no power to compel. *See* Hardwood Plywood Final IDM, *supra* note 24, cmt. 24, at 66. Further, the GOC offered Commerce other alternative means to verify that respondents had not benefitted from the program, including requesting that China EXIM Bank check its own records to discover if the respondent had benefitted from the program. *Id.* at 66-67.

139. *See* *Micron Technology, Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (“Congress has implicitly delegated to Commerce the latitude to derive verification procedures *ad hoc*.”).

140. *Hyundai Steel Co. v. United States*, 279 F. Supp. 3d 1349, 1364 (Ct. Int’l Trade Dec. 27, 2017).

141. *Id.* at 1361.

week before verification and puts respondents on notice of what they are expected to provide, Commerce asked for certain freight contracts, which, when Hyundai could not provide them, Commerce used as a basis for applying AFA.¹⁴² The CIT ruled that because the initial questionnaire had asked information about all of Hyundai's affiliates and the supplemental questionnaire had informed respondents of deficiencies in that response, Commerce was not again required to notify Hyundai of continued deficiencies.¹⁴³ With regard to the verification outline, because Commerce characterized it as "not necessarily all inclusive" and "reserve[d] the right to request any additional information or materials necessary for a complete verification," Commerce was under no obligation to put Hyundai on additional notice that its affiliates would be required to produce freight and insurance contracts with unaffiliated companies.¹⁴⁴ The lesson to be taken: although Commerce is not obligated to accept new information from respondents at verification, Commerce may ask for additional information from respondents which it had not before previously requested or noticed in its verification outline;¹⁴⁵ and if respondents fail to provide that information, Commerce is under no § 1677m(d) obligation to issue a deficiency notice and provide an opportunity to remedy so long as respondents were on notice that Commerce may ask for the information.

2. Power to Compel

Respondents cannot be found non-cooperative for failing to provide information to which they do not have access and have no power to compel. The corollary to this, of course, is that Commerce can apply AFA if it finds that a respondent could have exercised its power to induce a non-cooperating party from which Commerce requested to comply and did not exercise that power.¹⁴⁶ Typical relationships where this situation emerges involve respondents' relationships with affiliates,

142. *Id.* at 1360.

143. *Id.* at 1364.

144. *Id.*

145. *See id.* (discussing *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 Fed. Reg. 41,964 (Dep't of Commerce July 18, 2014); Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey, at 45 (July 10, 2014), <https://enforcement.trade.gov/frn/summary/turkey/2014-16860-1.pdf>).

146. *See, e.g.,* *Mueller Comercial de Mexico v. United States*, 753 F.3d 1227, 1233-36 (Fed. Cir. 2014).

suppliers, and subcontractors, and cases in which a change of ownership has occurred in the company.

With regard to affiliates, Commerce determines whether the non-cooperative party is “controlled” by the respondent, which it determines based on the understanding of control set forth in 19 U.S.C. § 1677 (33): “[A] person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” Thus, if the respondent owns a majority shares in a non-cooperative company, it will be found to be in control of that non-cooperative company. Control will also be found if Commerce determines that the respondent and non-cooperating party are part of an overarching “group” that “possesses the ability to directly or indirectly control its members.”¹⁴⁷

A respondent’s ability to induce its unaffiliated suppliers and subcontractors to cooperate with Commerce’s requests for information is more difficult to analyze. In *Mueller Comercial de Mexico v. United States*, the CIT upheld the application of an AFA rate to otherwise cooperative respondent Mueller Comercial, which purchased the majority of its subject merchandise from a supplier that refused to comply with Commerce’s information requests.¹⁴⁸ The CIT found Commerce to have appropriately applied AFA to Mueller Comercial because it could have induced its supplier to cooperate by leveraging the economic pull it had over it as a significant customer of the non-cooperative respondent.¹⁴⁹ However, in other cases the CIT and Federal Circuit have found this control dynamic insufficient to warrant applying AFA to a respondent for the misdeeds of its non-cooperative supplier or subcontractor. For instance, in *Stanley Works (Langfang) Fastening Systems Co., Ltd. v. United States*, the CIT affirmed Commerce’s finding that respondent Stanley Works did not have the power to compel factors of production data from an unaffiliated subcontractor.¹⁵⁰ Important to the CIT was that the respondent had been “forthcoming” with Commerce and made “multiple attempts” to obtain the information from the non-

147. See, e.g., *Hyundai Steel*, 279 F. Supp. 3d at 1358, 1362.

148. *Mueller Comercial de Mexico*, 753 F.3d at 1229.

149. *Id.* at 1234-35. Also important to Commerce is that it thought assigning Mueller the AFA rate calculated for the non-cooperative respondent would provide a more accurate calculation of Mueller’s ultimate dumping margin and its fears that the non-cooperative respondent could evade the antidumping order by selling its goods to Mueller, which would then import using a lower rate. *Id.* at 1232-35.

150. *Stanley Works (Langfang) Fastening Systems Co., Ltd. v. United States*, 964 F. Supp. 2d 1311, 1329 (Ct. Int’l Trade 2014).

cooperative subcontractor and failed in each.¹⁵¹

The basic rule is the following: in order for Commerce to apply AFA to an otherwise cooperative respondent due to the failures of an unaffiliated supplier or contractor to comply with Commerce's requests for information, Commerce "must link [the cooperative respondent] to its supplier's failures, as a matter of fact."¹⁵² To do otherwise would be to "accept a construction of 19 U.S.C. § 1677e(b) under which a party who suffers the effect of the adverse inference is not the party who failed to cooperate."¹⁵³ While *Mueller* to some degree may seem to belie this principle, *Mueller* can be distinguished from other cases where the business relationship between the respondent and the supplier is not as strong such that it would be inappropriate to attribute the supplier's non-cooperation to the respondent. However, *Mueller Commercial* does open the door to the idea that an otherwise cooperative respondent might be found non-cooperative for the sins of unaffiliated companies should Commerce hold that the respondent exercises a special pull over the non-cooperative respondent such as, perhaps, comprising a large portion of the non-cooperative respondent's business.

Cases of changes in ownership also raise difficult questions. For instance, in *Peer Bearing Co.-Changshan v. United States*, the Federal Circuit reversed the CIT's decision to reverse Commerce's finding that a respondent was non-cooperative for failing to provide requested information after a change in ownership.¹⁵⁴ There Commerce requested the sales records of respondent Peer Bearing's affiliate in order to conduct an export price analysis in an antidumping administrative review only after the case had been remanded back to Commerce.¹⁵⁵ During the time between the final results of the administrative review and the remand redetermination, Peer Bearing had changed ownership and the export price data that Commerce requested was no longer readily

151. *Id.*

152. See *Tianjin Magnesium Intern. Co., Ltd. v. United States*, Court No. 09-00535, 2011 WL 637623, at *2 (Ct. Int'l Trade Feb. 11, 2011) (reversing Commerce's determination to apply AFA because there was no specific action that respondent should have taken but did not take to which Commerce could point).

153. *Id.*

154. See *Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396 (Fed. Cir. 2014), *rev'g*, 853 F. Supp.2d 1365 (Ct. Int'l Trade 2012); see also *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335-38 (Fed. Cir. 2002) (finding a respondent non-cooperative following a change in ownership when it was no longer able to produce CEP data during a subsequent remand proceeding that Commerce had asked it to provide in the prior administrative review). Unlike in *Ta Chen*, in *Peer Bearing* Commerce had never requested the price data prior to the remand redetermination. See *Peer Bearing*, 853 F. Supp. 2d at 1374.

155. *Peer Bearing*, 766 F.3d at 1398-99.

available.¹⁵⁶ While the CIT held that Peer Bearing was under no obligation to anticipate a request that Commerce made only after remand, *i.e.* providing export price data, the Federal Circuit reversed, finding that the sort of export price data requested is that which a “reasonable importer should anticipate being called upon to produce.”¹⁵⁷ Therefore, when the respondent sold its ownership interest, it was required to ensure that the new owners would maintain records necessary for the EP analysis when it, according to the Federal Circuit, could have anticipated needing those records because there was an ongoing dispute as to the pricing methodology that Commerce had used in the administrative review.¹⁵⁸ Although *Peer Bearing* ultimately upheld Commerce’s non-cooperation finding, the case is instructive inasmuch as it illustrates how courts may come out differently when reviewing Commerce’s non-cooperation findings, all of which are highly facts-based and leave ample room for distinction.

Lastly, Commerce clearly cannot compel respondents to provide information that they do not have and cannot be expected to maintain. This issue often emerges in subsidies investigations in terms of requests for information that Commerce serves on foreign governments. For instance, in *Maverick Tube Corp. v. United States*, Commerce requested that the Government of Turkey (“GOT”) provide it with production and consumption data that the GOT, in turn, said it did not possess. Although the CIT found that Commerce casted doubts on the truthfulness of the GOT’s assertion, it ultimately held that Commerce must do more than assume “that the GOT in fact maintained, or had access to” the information requested, for “[s]peculation is not substantial evidence.”¹⁵⁹ Despite this ruling, Commerce has routinely found that governments have withheld information about government programs despite governments’ assertions to the contrary that the information requested is not available because it does not exist (*e.g.*, the information

156. *Id.* at 1398.

157. *Id.* at 1400 (citing *Nippon Steel*, 337 F.3d at 1382). This case presents facts similar to the *Grobtest* case discussed *supra* Part II.B., where respondent *Grobtest* was found non-cooperative for its failure to respond to Commerce’s information requests after a change in ownership, although there *Grobtest* attempted to withdraw from review and flatly did not respond to Commerce’s requests.

158. *Id.* at 1401.

159. *See Maverick Tube Corp. v. United States*, 37 I.T.R.D. 2829, 2016 WL 703575 (Ct. Int’l Trade Feb. 22, 2016) at *3; *see also Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990) (finding that it would be unreasonable for Commerce to request information from respondents that they did not have at its disposal) (“[A] ‘No’ answer is not a refusal to provide data. If there is no data, ‘no’ is a complete answer.”).

requested is not collected and/or maintained in the ordinary course), is confidential, or because it pertains to an entity over which the government has no formal power to compel.¹⁶⁰

3. Relevance

Commerce may only apply FA or AFA when “necessary information is not available on the record” or if one of the other four triggers of 19 U.S.C. § 1677e(a) is met.¹⁶¹ Although the plain language of the statute, as recognized by the Federal Circuit,¹⁶² does not require that the information Commerce replaces using FA or AFA be “necessary information,” Commerce typically does not apply FA or AFA unless it finds that the information of which it has been deprived is necessary for the investigation.¹⁶³ This understanding squares with language in the AFA statute that directs Commerce to “use facts otherwise available in reaching the *applicable* determination,” which suggests that the information that Commerce requests, and that the interested party withholds, must be—at the very least—related to the instant investigation or review.¹⁶⁴ However, in the absence of clear statutory language, the Federal Circuit and the CIT have been reluctant to impose a requirement on Commerce that the withheld information that Commerce uses as a basis to apply AFA must be necessary or relevant, holding Commerce instead to the basic requirement in *Nippon* that the information need only be “requested.”¹⁶⁵ In 2015, in *Borusan Manessman Boru Sanayi ve Ticaret A.S. (Borusan) v. United States*, the CIT seemed to impose this additional requirement, but in a later decision the CIT stopped short, explaining that its prior decision to remand Commerce’s application of AFA to respondent Borusan was not because it found that Commerce applied AFA based on the failure of Borusan to provide it unnecessary

160. See discussion of the Government of China’s alleged withholding of an internal regulation pertaining to administration of the Export Buyer’s Credit program, *supra* note 24.

161. 19 U.S.C. § 1677e(a) (2017). For the other four statutory triggers that may allow Commerce to apply FA, *see supra* note 4.

162. *See Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339, 1352 (recognizing a distinction between 19 U.S.C. § 1677e (a) (1) and (a) (2)).

163. *See, e.g., Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 Fed. Reg. 41,964 (Dep’t of Commerce July 18, 2014) (final affirmative determination); Issues and Decision Memorandum C-533-858 for the Final Determination in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods from India, at 11 (July 10, 2014), <https://enforcement.trade.gov/frn/summary/india/2014-16859-1.pdf>.

164. 19 U.S.C. § 1677e(a) (2017) (emphasis added).

165. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (emphasis added).

information, and thus, acted contrary to § 1677e(a); rather, it was due to Commerce's own assertion that the requested information was necessary when it had not explained why this was so.¹⁶⁶ Therefore, unless the CIT or Federal Circuit rule otherwise, it is far from clear that the statute imposes any requirement that the information requested by Commerce, the denial of which Commerce uses as a basis for AFA, actually be either necessary or relevant. Until then, the extent to which Commerce is bounded by this requirement is the extent to which Commerce binds itself.

Further, where courts have reviewed whether the information Commerce requested is "necessary" or "relevant," the Federal Circuit and the CIT have been extremely deferential to Commerce, opining that "[i]t is Commerce, not the respondent, that determines what information is to be provided."¹⁶⁷ For this reason, the CIT has typically been loath to consider respondents' arguments that information is not necessary or relevant because there is other information on the record that would demonstrate the same proposition.¹⁶⁸ Yet while Commerce is typically quick to assert this prerogative to determine relevance,

166. See *Maverick Tube Corp. v. United States*, 37 I.T.R.D. 2829, 2016 WL 703565 at *4 (Ct. Int'l Trade Feb. 22, 2016). In the prior decision, *Borusan Mannesman Boru Sanayi v. United States*, 61 F. Supp.3d 1306, 1348 (Ct. Int'l Trade 2015), the CIT had found that Commerce could not apply AFA to respondent Borusan for failing to provide information about inputs purchased for less than adequate remuneration ("LTAR") into non-subject merchandise because the information was not relevant to calculating Borusan's countervailable subsidy rate. See also CIT 19th Judicial Conference AFA Session, *supra* note 8 at 8 ("Where it seeks to apply AFA, Commerce must demonstrate that the omitted data is necessary and relevant; not simply that it was requested."). In *Maverick Tube*, the CIT, after clarifying that the issue before it was not one of statutory interpretation of 19 U.S.C. § 1677e(a), reversed its finding that the provisions of goods for LTAR in Borusan's non-subject merchandise was irrelevant, reasoning that, under Commerce's input-attribution methodology, the information was, after all, necessary. See *Maverick Tube*, 2016 WL 703565 at *6.

167. See *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (Ct. Int'l Trade 1986); see also *Acciai Speciali Terni S.p.A. v. United States*, 24 I.T.R.D. 1108, 2002 WL 342659 at *16-17 (Ct. Int'l Trade Feb. 1, 2002) (accepting Commerce's finding that information about a company's pre-privatization spinoffs and post-privatization sale of assets was relevant to its change-in-ownership analysis).

168. See, e.g., *Essar Steel Ltd. v. United States*, 721 F. Supp.2d 1285, 1298-99 ("Regardless of whether Essar deemed the . . . information relevant, it nonetheless should have produced it [in] the event that Commerce reached a different conclusion.") (rejecting respondents' arguments that it should provide duty exemption licenses for certain products to demonstrate its non-use of a subsidy program because, according to respondents, the information was not necessary as the respondent did not import those products); see also *PAM, S.p.A. v. United States*, 495 F. Supp. 2d 1360, 1369 n.17 (rejecting respondent's argument that Commerce could not apply AFA for respondent's failure to report all home market sales because some sales were made outside the ordinary course of business, and therefore, irrelevant).

Commerce surely cannot request *any* information from an interested party and, if the party withholds this information, no matter how irrelevant to the applicable determination, resort to AFA. Rather, Commerce is bound by a minimal requirement to act reasonably, for Commerce “has not been given power that can be ‘wielded’ arbitrarily as an ‘informal club.’”¹⁶⁹ To this end, there is at least perhaps some room in the jurisprudence for Commerce to determine certain requests unreasonable because the information requested is irrelevant, though this has rarely if ever happened.¹⁷⁰ Rather, arguments that requested information is not necessary or is irrelevant are more likely to bolster other arguments. And, of course, there is hope that the CIT might actually take the position it initially seemed to take in *Borusan* by actually requiring that Commerce demonstrate the necessity of requested information omitted in a respondent’s response before simply concluding it missing and applying AFA. However, that day, much to the rue of respondents, has yet to come.

B. *Reviewing Commerce’s Use of Evidence to Determine the AFA Rate*

While Congress has given Commerce broad discretion on *how* to apply AFA using secondary information, this discretion, like its discretion as to *when* to apply AFA, is not unbounded; yet it is considerable.¹⁷¹ When Commerce finds a respondent non-cooperative, the statute makes clear that Commerce may apply AFA by turning to facts derived from secondary sources, including the petition, a determination in the current or any prior proceeding, or any other information on the record.¹⁷² Thus, Commerce is not required to base its adverse inference on any one particular source.

To further illustrate how Commerce’s discretion is considerable, it is useful to understand how Congress has understood the meaning of “facts otherwise available” as set forth in 19 U.S.C. § 1677e(a). Prior to the URAA and subsequent amendment of the AFA statute, the AFA statute read that Commerce had the authority to apply the “best

169. *See* *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990) (finding that it would be improper for Commerce “to mak[e] repeated requests for information which a party has already submitted until the party becomes frustrated and refuses to comply” or to request information about sales when, in fact, a respondent did not make sales.).

170. Also note 19 U.S.C. § 1677m(c)(1) (2017) states that Commerce, in requesting information from respondents, must “consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden.”

171. *See* *De Cecco*, 216 F.3d at 1032.

172. 19 U.S.C. § 1677e(b)(2) (2017).

information available,” but after passage of the URAA, “best information available” was changed to “facts available”; the change “was one in terminology only and was intended to incorporate prevailing practice.”¹⁷³ However, the term “best information available” does not mean that the facts used by Commerce to replace missing information “are the best alternative information.”¹⁷⁴ According to the SAA accompanying the URAA, “proving that the facts selected are the best alternative facts would require that the facts available be compared with the missing information, which obviously cannot be done.”¹⁷⁵ Where Commerce also has the authority to apply AFA under 19 U.S.C. § 1677e(b), its latitude is even greater, extending also to Commerce’s determination of whether to apply partial or total AFA, as discussed *supra*.¹⁷⁶

In reviewing Commerce’s determinations of AFA rates, courts have proscribed how Commerce determines the AFA rate in two principal ways: 1) by subjecting Commerce to the corroboration requirements laid out in 19 U.S.C. § 1677e(c) and 2) by requiring Commerce not to ignore information record information when it is credible. While both proscriptions are certainly related, it is useful to discuss both separately because the second pre-existed the corroboration requirement. The corroboration requirement was not placed in the AFA law until the URAA, while the requirement not to ignore record evidence is part of the substantial evidence requirement that undergirds all of Commerce’s fact-finding. Further, the corroboration requirement does not apply when Commerce uses “primary information,” *i.e.*, information derived from the record collected in the same investigation or review (even if not the non-cooperative respondent’s own data), such as it does when

173. *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1255, n. 3 (Fed. Cir. 2009) (citing URAA Statement of Administrative Action, 1994 U.S.C.C.A.N. at 4156). It should be noted that both the AD and SCM Agreements also use the term “best information available” to elaborate upon what is meant by “facts available.” *See, e.g.*, AD Agreement, *supra* note 6, Annex II; SCM Agreement, *supra* note 6, art. 18.6. For instance, Article 6.8 of the AD Agreement stipulates that determinations “may be made on the basis of facts available,” AD Agreement, *supra* note 6, art. 6.8, while the heading of Annex II of the AD Agreements reads “Best Information Available in Terms of Paragraph 8 of Article 6.” AD Agreement, *supra* note 6, Annex II.

174. URAA Statement of Administrative Action, *supra* note 31, at 4198.

175. *Id.* at 4199.

176. *Compare* *De Cecco*, 216 F.3d at 1032 (“In the case of uncooperative respondents, the discretion granted by statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences.”) *with* *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (finding that the methodology by which Commerce applies FA to cooperative respondent is “based on the best available information and establishes antidumping margins as accurately as possible.”); *see also* *AK Steel Corp. v. United States*, 346 F. Supp.2d 1348, 1355 (Ct. Int’l Trade 2004).

applying partial AFA.¹⁷⁷ The requirement not to ignore record evidence, on the other hand, applies to all of Commerce’s findings, regardless of whether primary or secondary information is used.

1. The Requirement to Corroborate

The requirement to corroborate emerges from 19 U.S.C. § 1677e(c) and requires that Commerce, “to the extent practicable, *corroborate* the information from secondary sources that are reasonably at their disposal.”¹⁷⁸ However, the statute provides no detail as to the meaning of the term “corroborate” or any methodology as to how Commerce is to approach corroboration.¹⁷⁹ As a result, its meaning has been hotly contested in the past two decades as both the Federal Circuit and the CIT have used it to curtail Commerce’s discretion and invalidate AFA rates. The TPEA’s amendments to the AFA statute were a reaction to these court decisions. This section will discuss the history of the corroboration requirement and what remains of it after the TPEA.

Before the URAA, in applying total AFA Commerce largely assigned the highest prior margin calculated for a cooperative respondent in the same investigation or review or a prior review, “reflect[ing] a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the [non-cooperative respondent], knowing of the rule, would have produced *current* information

177. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (“Because Commerce selected a dumping margin within the range of Ta Chen’s actual sales data, we cannot conclude that Commerce ‘overreached reality.’ Thus, we will not disturb Commerce’s selection of the 30.95% dumping margin.”). Despite the extensive discussion of corroboration in *Ta Chen*, that the corroboration requirement did not apply is supported by the Federal Circuit’s discussion of the case in *Gallant Ocean*. *See Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (“Ta Chen was not a corroboration case as Commerce relied on primary information-i.e., Ta Chen’s sales data from the relevant review period-in calculating the AFA rate.”); *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1349 (Fed. Cir. 2016). Often the primary information used is not data that the respondent placed on the record, but rather comes from other respondents, *e.g.* the highest transaction-specific margin for a cooperating respondent in the course of the same investigation or review. *See, e.g.*, *Steel Concrete Reinforcing Bar From Taiwan*, 82 Fed. Reg. 34,925 (Dep’t of Commerce July 27, 2017) (final determination); Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Steel Concrete Reinforcing Bar from Taiwan, at 14 (July 20, 2017), <https://enforcement.trade.gov/frn/summary/taiwan/2017-15840-1.pdf>.

178. 19 U.S.C. § 1677e(c) (2017) (emphasis added).

179. *See, e.g.*, *Mittal Steel Galati S.A. v. United States*, 491 F. Supp.2d 1273, 1278 (Ct. Int’l Trade 2007).

showing the margin to be less.”¹⁸⁰ Yet, as the CIT has recognized, “as part of the implementing legislation, however, Congress directed Commerce to make additional findings in AFA cases.”¹⁸¹ The corroboration requirement in 19 U.S.C. § 1677e(c) requires those additional findings. According to the SAA and Commerce’s own rule, corroboration means that Commerce will “examine whether the secondary information to be used has “probative value.”¹⁸²

In assessing whether a rate assigned to a non-cooperative respondent has “probative value,” Commerce has long looked to whether the secondary information used to establish the rate is “reliable and relevant.”¹⁸³ The Federal Circuit and CIT have also held Commerce to this requirement.¹⁸⁴ Yet what is meant by “reliable” and “relevant” is not clear. Is a rate reliable and relevant simply because Commerce applied it—even if to another respondent—in a previous segment of the same proceeding even if that rate was determined years before? And what if Commerce uses a petition rate? Does Commerce simply have to establish that the alleged rate of dumping or subsidization might be possible? Where a respondent has not provided any data or Commerce has disregarded it as wholly unreliable and applied total AFA, does Commerce somehow have to compare the rate it establishes for the non-cooperative respondent using what little reliable information it can dig up to the rate of a comparable cooperative respondent on which it bases its AFA finding? What does “to the extent practicable” mean, and are there ever any circumstances when corroboration is wholly impracticable, *e.g.*, when a respondent has not provided any response at all?

180. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990); *see* *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) (“While the highest prior margin is obviously not a precise indicator of current dumping practices, it provides at least some guidance . . . and it is preferable in that respect to an arbitrarily selected figure that has no pretension to accuracy.”).

181. *Tianjin Mach. Import & Export Corp. v. United States (Tianjin II)*, 752 F. Supp. 2d 1336, 1347-48 (Ct. Int’l Trade 2011).

182. URAA Statement of Administrative Action, *supra* note 31, at 4199; 19 C.F.R. § 351.308(d) (2017). The rule also notes that “[t]he 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.” 19 C.F.R. § 351.308(d) (2017).

183. *See* *Fresh Cut Flowers From Mexico*, 61 Fed. Reg. 28,166, 28,167 (Dep’t of Commerce June 4, 1996) (prelim. results).

184. *See, e.g., Ad Hoc Shrimp Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2014) (“To corroborate secondary information, Commerce must find the information has ‘probative value’ by demonstrating the rate is both reliable and relevant.”).

Not surprisingly, given the ambiguity of the requirement, Commerce and the courts had, at least before the TPEA, long disagreed on what these terms mean. For instance, in *Lifestyle Enterprise, Inc. v. United States*, Commerce argued that the 216.01% margin that it had assigned respondent Lifestyle based on the rate it had calculated for another respondent in a previous new shipper review was both reliable and relevant because it had been calculated in the same proceeding, albeit in a previous segment four years prior and for a very small new shipper (and only a small percentage of respondent's transaction-specific dumping margins were in that range).¹⁸⁵ However, the rate assigned to Lifestyle was 3,000% higher than that which it had been assigned in a prior review based on its own data and was 700% greater than the highest rate assigned to any cooperative respondent.¹⁸⁶ Reasoning that the small percentage of the transaction-specific sales used to corroborate the margin were not probative given the disparity between the AFA rate and the other rates calculated in this and prior reviews and given that the company on which the rate was based was in no way comparable to Lifestyle, as it was based on a much older rate for a much smaller company, the CIT rejected the rate and remanded to Commerce.¹⁸⁷ In doing, the CIT made clear that Commerce "cannot 'proceed[] on the basis that prior calculated margins are *ipso facto* reliable'"—rather, Commerce must do more to show relevancy and reliability in relation to [a respondent's] commercial reality" than simply assert that the rates are reliable and relevant because they were calculated in a prior investigation or review.¹⁸⁸ Although the TPEA has since rejected that Commerce must tie the AFA rate it applies to non-cooperative respondents to their commercial reality, and more so, excepted dumping and countervailable subsidy rates determined in previous segments of the same proceeding from the corroboration requirement altogether, it is important to understand how such notions of tying the adverse information applied to the actual situation of the respondent (*i.e.*, their commercial reality) sprang up before discussing what, if anything, is left of the doctrine in today's post-TPEA world.

The guiding case giving birth to the notion that a non-cooperative respondent's rate ought to be corroborated to reflect some relation to

185. *Lifestyle Enterprise, Inc. v. United States (Lifestyle)* 844 F. Supp.2d 1283, 1289-90 (Ct. Int'l Trade 2012).

186. *Id.* at 1290.

187. *Id.* at 1290-91.

188. *Id.* at 1288, n.5 (citing *Ferro Union, Inc. v. United States*, 44 F.Supp.2d 1310, 1334 (Ct. Int'l Trade 1999)).

their actual rate, *i.e.*, the rate that would have been determined if the respondent had cooperated, is *F. Ili De Cecco Di Filippo Fara S. Martin S.p. A. v. United States* (“*De Cecco*”) (2002), which instructs that

Congress could not have intended for Commerce’s discretion to include the ability to select unreasonably high rates *with no relationship to the respondent’s actual dumping margin* . . . Congress tempered deterrent value with the corroboration requirement. It could have only done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to *overreach reality* in seeking to maximize deterrence.¹⁸⁹

In *De Cecco*, Commerce arrived at its AFA rate by averaging the alleged margins of dumping in its initiation notice, which, of course, were based on the dumping margins alleged by the petitioner.¹⁹⁰ Commerce argued that the petition rate, because it was based on public data, was self-corroborating, an argument with which both the CIT and the Federal Circuit strongly disagreed.¹⁹¹ In interpreting the statute, the Federal Circuit made clear that the corroboration requirement had teeth; Commerce must, at least with regard to AFA rates based on

189. *F. Ili De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (emphasis added). Note that prior cases had laid similar requirements on Commerce, though stopped short of requiring the AFA rate to be a “reasonably accurate estimate” of the respondent’s actual margin. *See, e.g.*, *D&L Supply Co. v. United States*, 113 F.3d 1220, 1223-24 (Fed. Cir. 1997) (holding that Commerce cannot select a rate based solely on inducing cooperation but rather must ensure that the rate “have some relationship to commercial practices in the particular industry” of which the non-cooperative exporter is a member). In *D&L Supply*, Commerce had applied a 92.74% rate that it had calculated in a prior review; however, that rate was subsequently invalidated by the CIT and, upon remand, Commerce calculated a rate of 31.05%. *Id.* at 1221-22. Despite the CIT having invalidated the prior rate, Commerce argued that it could continue to apply it as AFA because the rate is supposed to be sufficiently high to induce cooperation even if that rate is “grossly excessive.” *Id.* at 1222-23. The Federal Circuit disagreed, finding that because the rate was, in fact, “grossly excessive” and “seriously flawed,” it could not serve as a “rough index of conditions in the industry.” *Id.* at 1223-24.

190. *De Cecco*, 216 F.3d at 1030.

191. *See Borden, Inc. v. United States*, 4 F. Supp.2d 1221, 1247-48 (Ct. Int’l Trade 1999) (first remand). Another interesting question emerging from *De Cecco* is whether the CIT or Federal Circuit might be able to require Commerce to use a particular rate. According to the Federal Circuit, suggesting a rate is “not an impermissible limitation on Commerce’s discretion. Indeed, in our view, the court’s remand order imposes no limitation on Commerce at all.” *De Cecco*, 216 F.3d at 1033. However, the Federal Circuit left open the question of whether it would be permissible for a court to order Commerce to apply a particular rate. *See id.*

petitions, take some step to ensure that the AFA rate bears some relation to—even that it be a “reasonably accurate estimate of”—the respondent’s actual rate of dumping or subsidization, “albeit with some built-in increase intended as a deterrent to non-compliance.”¹⁹²

For the next ten years, *De Cecco*’s “reasonably accurate estimate” requirement continued to be used to invalidate AFA rates that crept too far from the rate that would have been calculated for respondents if they had cooperated; however, it was not until 2010, in *Gallant Ocean (Thailand) Co., Ltd. v. United States*, that the Federal Circuit first used the term “commercial reality” in the context of AFA.¹⁹³ In *Gallant Ocean*, the Federal Circuit invalidated an AFA rate of 57.64% that Commerce based on an adjusted petition rate, noting that it was more than ten times higher than the average dumping margin for cooperating respondents and more than five times higher than the highest rate assigned to a cooperative respondent.¹⁹⁴ In order to corroborate the adjusted petition rate, Commerce took the fact that a small percentage of all of the mandatory respondents’ sales were made at the 57.64% dumping rate as sufficient to conclude that the rate was a “reasonably accurate estimate” even though “most transactions during the period of review had significantly lower dumping margins.”¹⁹⁵ However, “[b]ecause Commerce did not identify any relationship between the small number of unusually high dumping margin transactions with Gallant’s actual rate, those transaction [could not] corroborate the adjusted petition rate.”¹⁹⁶ In the words of the Federal Circuit, the rate, therefore, did not “represent commercial reality.”¹⁹⁷

As in *Gallant Ocean*, to corroborate total AFA dumping margins, Commerce usually takes a subset of the transaction-specific margins calculated for the respondent’s actual sales to determine if any of these transaction-specific margins are within the range of the total AFA

192. *De Cecco*, 216 F.2d at 1032 (“[Congress] intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent’s actual rate, *albeit with some built-in increase intended as a deterrent to non-compliance.*”) (emphasis added); see also *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (holding that Commerce in antidumping investigations may consider deterrence when deciding what the AFA rate will be “so long as the rate chosen has a relationship to the actual sales information available.”).

193. 602 F.3d 1319, 1323 (Fed. Cir. 2010).

194. *Id.* at 1323-24.

195. *Id.* at 1324.

196. *Id.*

197. *Id.* at 1323.

margin it wants to assign.¹⁹⁸ In cases where Commerce has not been able to identify even a single instance where the non-cooperative respondent's transaction-specific margins are higher than the AFA rate selected, the CIT has invalidated the AFA rate.¹⁹⁹ However, in cases where Commerce has found a reasonable number of transaction-specific margins to be higher than the AFA rate selected, even when the AFA rate selected is from a prior review many years in the past, the CIT has affirmed Commerce's corroboration of the rate.²⁰⁰ Nonetheless, the Federal Circuit and CIT have been critical when Commerce uses only a small percentage of respondent's sales data to corroborate total AFA rates, as was the case in *Gallant Ocean and Lifestyle*, discussed above. Another example of this occurred in *Dongguan Sunrise Furniture v. United States* ("*Dongguan F*"), where Commerce calculated a partial AFA rate of 43.23% for respondent Fairmont that used a rate of 216% rate taken from a new shipper review four years previous to calculate transaction-specific margins for Fairmont's unreported sales.²⁰¹ Here, Commerce claimed that it had corroborated use of the 216% rate because 1.21% of Fairmont's sales were dumped at margins above 216%.²⁰² Because there was only a "small percentage of sales" that were

198. See, e.g., 1,1,1,2 Tetrafluoroethane (R-134a) From the People's Republic of China, 82 Fed. Reg. 12,192 (Dep't of Commerce Mar. 1, 2017) (final determination); Issues and Decision Memorandum A-570-044 for the Final Determination of the Antidumping Duty Investigation of 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China, at 3-4 (Feb. 21, 2017), <https://enforcement.trade.gov/frn/summary/prc/2017-03961-1.pdf> (finding a petition rate of 220.90% and the highest rate for any respondent in the same proceeding (here, the PRC-wide entity rate of 232.30%) uncorroborated because it was higher than any of the non-cooperative respondent's transaction-specific margins).

199. See *Shandong Huarong General Group Corp. v. United States*, 29 C.I.T. 1227,1235-38, 2005 WL 2365322 at *6-7 (Ct. Int'l Trade Sept. 27, 2005) (rejecting a 139.31% rate as uncorroborated for another respondent in the prior review where the highest of eighty-seven transaction specific margins was 120.53% and only thirteen others were above *de minimis*, ranging from 97.84% to 117.20%); *Am. Silicon Technologies v. United States*, 240 F. Supp.2d 1306, 1312-13 (Ct. Int'l Trade 2002) (rejecting a 93.20% rate from a rate calculated for another respondent six years previous as uncorroborated where the highest transaction-specific margin was 25% lower than the AFA rate selected).

200. *Mittal Steel Galati S.A. v. United States*, 491 F. Supp.2d 1273, 1278-79 (Ct. Int'l Trade 2007) (holding a 75.04% rate to be corroborated even though it was from a twelve-year old petition rate because it "relied on sales margins that exceeded 75.04% as well as sales with a calculated margin within a 10% range of the AFA rate"). Further, the petition rate calculated used NME methodology, as the exporter was from Romania, and at the time Romania was considered a NME, even though at the time of the review twelve years later it was no longer. See *id.* at 1278.

201. *Dongguan Sunrise Furniture Co. v. United States* (*Dongguan I*), 865 F. Supp. 2d 1216, 1225 (Ct. Int'l Trade 2012).

202. *Id.* at 1232-34.

higher than the 216% rate used, the CIT rejected the AFA rate, ruling it not commercially reasonable.²⁰³ Yet, in other cases where Commerce uses a higher percentage of transaction-specific margins to corroborate the selected AFA rate, the CIT is more likely to affirm—as it is reasonable to conclude, the higher the percentage the transaction-specific margins sales taken, the more reliable and relevant the AFA rate.²⁰⁴ Yet a substantial percentage of transaction-specific margins is by no means necessary. In one case the Federal Circuit affirmed the corroboration of an AFA rate calculated for the same respondent but in a prior review two years previous where Commerce could only point to 0.5% of sales that yielded higher transaction-specific margins than the AFA selected rate of 45.49%.²⁰⁵ The same can be said of rates selected that are taken from more recent reviews as opposed to reviews many years in the past and rates where the rate selected resembles the rate assigned in prior reviews, especially where the rates calculated in prior reviews have not been volatile.²⁰⁶

Corroboration in subsidies cases is slightly different. When applying total AFA in subsidies cases, Commerce essentially makes two AFA findings. First, it identifies all of the countervailable subsidy programs from which the respondent could have conceivably benefitted; second, it then assumes that the respondent benefitted from all of these subsidy programs simultaneously.²⁰⁷ With regard to the first, for each subsidy program Commerce applies its standard AFA methodology codified in

203. *Id.* at 1234.

204. *See, e.g.*, *Nan Ya Plastics Corp., Ltd. v. United States*, 6 F. Supp.3d 1362, 1369-70 (Ct. Int'l Trade 2014) (holding a 74.34% rate to be corroborated where Commerce found “numerous transaction-specific margins” calculated using respondent’s data from a prior review above 74.34%) (emphasis added).

205. *PAM S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009).

206. *See Tianjin Machinery Import & Export Corp. v. United States (Tianjin II)*, 752 F. Supp.2d 1336, 1349-50 (Ct. Int'l Trade 2011) (second remand) (rejecting an AFA rate of 139.31% because Commerce had never calculated a non-AFA rate for the same respondent of more than 34.00%); *Tianjin Machinery Import & Export Corp. v. United States (Tianjin I)*, 31 C.I.T. 1416, 1434-35, 2007 WL 2701368 at *14-15 (Ct. Int'l Trade Aug. 28, 2007) (first remand). In a previous administrative review, Commerce had attempted to assign this same rate to the respondent. *See Shandong Huarong Gen. Grp. Corp. v. United States*, 31 C.I.T. 42, 45-47 (Ct. Int'l Trade 2007) (affirming a rate that was just 13.88% higher than the 34.00% rate after two remands where Commerce had rejected the 139.31% AFA rate); *Shandong Huarong Gen. Grp. Corp. v. United States*, 29 C.I.T. 1227, 1232-36 (Ct. Int'l Trade 2005) (rejecting the 139.31% AFA rate and Commerce’s argument that the rates calculated for the same respondent in prior reviews had been volatile because this volatility was not enough to justify “such a large absolute increase”).

207. *Tai Shan City Kam Kiu Aluminum Extrusion Co. Ltd. v. United States (Kam Kiu I)*, 58 F. Supp.3d 1384, 1392 (Ct. Int'l Trade 2015).

19 U.S.C. § 1677e(d)(1)(A), discussed *supra*,²⁰⁸ applying either the highest countervailable subsidy rate for the same or similar program calculated for a cooperating respondent in a prior segment of the same proceeding; or, if there is no such rate available, the same or similar program in a different countervailing duty proceeding involving the same country.²⁰⁹ According to Commerce, such a rate is corroborated because it is both reliable and relevant—it is reliable because it has been calculated in a previous investigation or review; and it is relevant because the program is either the same program or a similar program to one that the respondent could have received a benefit.²¹⁰

The Federal Circuit and the CIT have for the most part accepted this approach, finding that it corroborates to the extent practicable the rate of actual subsidization at least where Commerce has been deprived of the information it requires to determine actual use and the actual rate of subsidization due to either the failure of respondent companies or the subsidizing government to develop the record.²¹¹ This is certainly the case where no other company in the subsidy proceeding cooperated and there is no independent information to determine program use and the rate of subsidization.²¹² For instance, in *Essar Steel, Ltd. v. United States*, no respondent cooperated in the investigation and no rates for the specific programs alleged had been calculated in prior proceedings such that “Commerce had limited available data (from any proceeding) about the [alleged] programs.”²¹³ However, in *Tai Shan City Kam Kiu Aluminum Extrusion Co. Ltd. v. United States* (“*Kam Kiu*”), the CIT held that where Commerce has not explained that there were “no other independent sources of company specific benefits on the record,” it cannot claim that the rate has been corroborated.²¹⁴ At

208. *Supra* Part I.

209. Commerce does not have to corroborate rates calculated using evidence gathered in the course of the same proceeding because that evidence is considered primary, not secondary, information. See 19 U.S.C. § 1677e(c)(2) (2017).

210. See *Kam Kiu I*, 58 F. Supp. 3d at 1392 (citing *Aluminum Extrusions from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011*, 79 Fed. Reg. 106 (Dep’t of Commerce Jan. 2, 2014); Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Aluminum Extrusions from the People’s Republic of China, at 8-9 (Dec. 26, 2013), <https://enforcement.trade.gov/frn/summary/prc/2013-31408-1.pdf>).

211. See, e.g., *Fengchi Imp. & Exp. Co., Ltd. of Haicheng City v. United States*, 59 F. Supp. 3d 1386, 1397 (Ct. Int’l Trade 2015).

212. See *Kam Kiu I*, 58 F. Supp.3d at 1395-96 (distinguishing the facts in *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1370-71 (Fed. Cir. 2014) from those in the instant case).

213. *Essar Steel, Ltd. v. United States*, 908 F. Supp.2d 1306, 1312 (Ct. Int’l Trade 2013).

214. *Kam Kiu I*, 58 F. Supp. 3d at 1395-96 (Ct. Int’l Trade 2015).

fundamental issue in *Kam Kiu* was whether Commerce could reasonably conclude, as it had in *Essar Steel*, that respondent Kam Kiu could have simultaneously benefitted from every program on which Commerce initiated regardless of its location.²¹⁵ In *Kam Kiu*, Commerce calculated a total AFA rate of 121.22% based on the assumption that respondent Kam Kiu had benefitted from every Chinese program on which Commerce initiated regardless of the location of its plants, which Commerce said, due to the unreliability of Kam Kiu's data, it could not determine because the company had failed to submit quantity and value information by Commerce's deadline.²¹⁶ However, the CIT rejected this reasoning, arguing that even if it determined that all of Kam Kiu's data was wholly unreliable, Commerce could have used independent information to corroborate whether Kam Kiu could have simultaneously benefitted from every program, *e.g.*, information Kam Kiu had submitted in prior proceedings or the information other respondents had submitted in the same segment of the proceeding at issue.²¹⁷ Thus, at least where location-specific benefits are at issue and a respondent's location can be corroborated to determine non-use, Commerce must do more than resort to its standard AFA methodology. To the extent that Commerce may be required to do more where independent information exists that may be used to corroborate non-use in other circumstances—for instance, if information from a prior proceeding evidences that a respondent does not qualify for a program for some other reason—*Kam Kiu* is powerful precedent. For

215. *Id.* at 1394 (“Commerce’s explanations do not address the overarching problem identified above, that Kam Kiu could conceivably benefit from all of the programs simultaneously. While it is true that Commerce’s methodology does lead to the selection of programs which have some probative value, evidence reasonably at Commerce’s disposal suggests that Kam Kiu could not have benefited from all of these programs at the same time.”).

216. *Id.* at 1386-87.

217. *Id.* at 1394. In its remand redetermination, Commerce, under protest, calculated a lower AFA rate of 79.80% that excluded the location-specific programs for which it could not provide evidence that Kam Kiu could have benefitted. *See Tai Shan City Kam Kiu Aluminum Extrusion Co. Ltd. v. United States (Kam Kiu II)*, 125 F. Supp. 3d 1337, 1345-46 (Ct. Int'l Trade 2015). In doing, the CIT rejected Commerce's argument that it is the respondent's responsibility to provide cross-ownership structure and facility locations, arguing that doing so “effectively implements a rebuttable presumption” that can only be rebutted if the respondent “could definitively show . . . that either the respondent or the respondent's industry did not use a program.” *Id.* at 1347. Simply put, Commerce shifts its congressionally mandated affirmative burden to the respondent. Such an approach cannot coexist with the corroboration requirement. *Id.* Congress could not have possibly intended to place the burden on the interested parties, especially considering Congress requires Commerce to look beyond the record and use independent sources to corroborate secondary information.” *Id.* (citing the URAA Statement of Administrative Action, *supra* note 31 at 4199).

instance, in *Essar Steel*, the CIT ruled that Commerce was not required to use information from a prior administrative review that evidenced that a respondent had applied for and been found eligible for a particular program but only because this information had been placed on the record of the prior administrative review *after* the final results had been issued in the administrative review being challenged; thus, the CIT did not reach this issue.²¹⁸

Kam Kiu is also important for another proposition it makes—that where Commerce has applied a total AFA rate that is “in stark contrast” to the countervailable subsidy rate calculated for other mandatory respondents in the same investigation or review, it has to corroborate the AFA rate in the aggregate if it is to be considered “a reasonably accurate estimate of [a respondent’s] actual countervailing duty rate.”²¹⁹ According to the CIT, “inherent in Commerce’s methodology of applying all conceivably used subsidies to *Kam Kiu* is another adverse inference. This building of adverse inferences on top of each other to create a rate that Commerce does not corroborate in the aggregate leaves the court with the impression that the rate is punitive” and not “a reasonably accurate estimate.”²²⁰ Thus, at first glance, in terms of the second stage of Commerce’s total AFA approach, *Kam Kiu* would seem to require that Commerce at least make some additional effort to tie the total aggregate rate to the respondent’s particular situation as it may compare with other respondents in the same proceeding. However, in its review of Commerce’s remand redetermination, the CIT clarified that where Commerce has corroborated the individual programs used to calculate a non-cooperative respondent’s rate, it does not have to perform an additional step.²²¹ Commerce need only perform this step if it carries over a previously calculated rate from a different proceeding, which, unlike in dumping investigation, has not been Commerce’s practice.²²²

Despite the corroboration requirement’s checks on Commerce, there is reason to doubt that the requirement still has much bite after

218. *Essar Steel, Ltd. v. United States*, 908 F. Supp. 2d 1306, 1313 (Ct. Int’l Trade 2013).

219. *Tai Shan City Kam Kiu Aluminum Extrusion Co. Ltd. v. United States (Kam Kiu I)*, 58 F. Supp. 3d 1384,1396 (Ct. Int’l Trade 2015). The CIT was particularly disturbed by the fact that the total AFA rate of 121.22% was “in stark contrast” to the rates applied to the other two mandatory respondents in the review, for which, calculated across two years, were 15% and 1%, and which also involved adverse inferences. *Id.*

220. *Id.*

221. *Kam Kiu II*, 125 F. Supp. 3d at 1352.

222. *Id.*

passage of the TPEA.²²³ Under the AFA statute as amended by the TPEA, Commerce is no longer required “for the purpose of [the corroboration requirement] or any other purpose—to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate . . . had cooperated; or to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.”²²⁴ This clearly eviscerates *De Cecco*’s requirement that Commerce calculates a rate that is a “reasonably accurate estimate” of a non-cooperative respondent’s actual rate if the respondent had cooperated, and, in fact, seems to go even further because there were cases before *De Cecco* that referred to Commerce “assign[ing] a rate that accurately reflects what a company’s rate would have been had it cooperated.”²²⁵ It also clearly eliminates that the AFA rate applied have any semblance to a respondent’s “commercial reality.”²²⁶ Further, Congress’s use of the term “alleged commercial reality” in 19 U.S.C. § 1677e(d)(3)(B) no doubt reflects its discontent with the CIT and the Federal Circuit’s attempts to place limits on Commerce’s power to use AFA.²²⁷ In *Özdemir*, the first decision heard by the CIT under the amended AFA statute, the CIT did not apply either *De Cecco* or *Gallant Ocean*, and with regard to *De Cecco*, referenced its requirement that an AFA rate “be a reasonably accurate estimate of the respondent’s actual rate” as tied to “the previous iteration of the statute.”²²⁸ Further, under the amended statute, Commerce is excepted from

223. Trade Preferences Extension Act of 2015, *supra* note 30. The TPEA is also known as the Leveling the Playing Field Act. Although TPEA was signed into law on June 29, 2015, Commerce did not immediately begin operating under the new statute and issued an interpretive rule to establish its dates of application. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Law Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793, 46,794 (Aug. 6, 2015). The amendments pertaining to AFA apply only to Commerce’s determinations made on or after Aug. 6, 2015. *Id.* at 46,794.

224. 19 U.S.C. § 1677e(d)(3) (2017).

225. *See* Shandong Huarong General Grp. Corp. v. United States, 29 C.I.T. 1227, 1232 2005 WL 2365322 at *3 (“Commerce’s goal is to assign a rate that accurately reflects what a company’s rate would have been had it cooperated. It is to that rate that Commerce is then permitted to add an amount to deter non-compliance.”).

226. *See* Fresh Garlic Producers Ass’n v. United States, 121 F. Supp. 3d 1313, 1329 (Ct. Int’l Trade 2015) (comparing 19 U.S.C. § 1677e(d)(3)(B) (2012) with *Gallant Ocean* (Thai.) Co. v. United States, 602 F.3d 1319, 1324 (Fed. Cir. 2010)).

227. *See* *Senators Tell Commerce to Ensure ‘Level the Playing Field Act’ Is Enforced*, INSIDE U.S. TRADE (Mar. 24, 2016), <https://insidetrade.com/inside-us-trade/senators-tell-commerce-ensure-level-playing-field-act-enforced>.

228. *Özdemir Boru San. ve Tic. Ltd. STI v. United States*, 273 F. Supp. 3d 1225, 1245 (Ct. Int’l Trade 2017) (quoting *De Cecco* 216 F.3d at 1032).

corroborating dumping margins or countervailing duty rates applied in separate segments of the same proceeding.²²⁹ Therefore, all of the cases pertaining to corroboration of rates calculated for the same respondent in previous investigations and reviews are null. Although it is still far from clear what is left of the corroboration requirement, for surely it must mean something, the most likely result is that the Federal Circuit and CIT, if they even go this far, revert to pre-*De Cecco* understandings that the rate be a “rough index of conditions in the industry,” and that, to the extent they are “grossly excessive,” would not be corroborated.²³⁰

2. The Requirement Not to Ignore Record Evidence

Different, albeit related, to the requirement to corroborate is the requirement not to ignore record evidence. Put another way, just because Commerce is applying AFA, it cannot operate in a factual vacuum devoid of the record information it has before it. Considering the full record before it does not bar Commerce from ignoring non-record information, such as information it rejects at verification for having come too late in the proceeding; however, it does require that Commerce consider all relevant record information. This requirement is separate from the corroboration requirement, and in some ways, more powerful because its undergirding is the substantial evidence requirement and the requirement that Commerce must offer reasonable explanations of its decisions. These standard administrative law requirements, unlike the corroboration requirement, which applies only to AFA rates calculated using secondary information, apply to all AFA rates regardless of whether primary or secondary information is used.²³¹ For example, in *De Cecco*, the Federal Circuit ruled that Commerce could not use information from the petition that its own investigation had “thoroughly discredited.”²³² There, Commerce had evidence that dumping margins for most respondents were much lower than alleged in the petition and that high-end producers, similar to the non-cooperative respondent against which AFA had been applied, tended to have among the lowest dumping

229. 19 U.S.C. § 1677e(c)(2) (2017).

230. *D&L Supply Co. v. United States*, 113 F.3d 1220, 1223-24 (Fed. Cir. 1997).

231. *See, e.g., Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1258 (Fed. Cir. 2009); *see also Mueller Comercial de Mexico v. United States*, 807 F. Supp. 2d 1361, 1371 (Ct. Int'l Trade 2011) (“[A]ny decision to abandon the application of this rate in favor of the highest transaction specific rate of another respondent in a previous administrative review must be fully explained and based on substantial evidence,” or would otherwise be ‘arbitrary.’”).

232. *F. Ili De Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

margins.²³³ The SAA also addresses the requirements of substantial evidence and reasonableness, stating that Commerce “must make their determinations based on all evidence on the record, weighing the record evidence to determine that which is most probative of the issue under consideration.”²³⁴ Although “[t]he possibility of drawing two separate conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence,”²³⁵ to the extent that Commerce ignores record information, especially when that record evidence squarely contradicts its findings, the Federal Circuit and the CIT are less likely to find an AFA rate supported by substantial evidence. As will be discussed at the conclusion of this section, the requirement not to ignore record information is all the more powerful given the TPEA’s weakening of the corroboration requirement.

Even when Commerce applies total AFA, it must not ignore record information. For instance, in *Gerber Food (Yunnan) Co., Ltd. v. United States*, Commerce applied the PRC-Wide entity rate, almost always calculated using AFA, as the AFA rate applicable to respondent Gerber—this despite information that Gerber had placed on the record evidencing its separate rate status.²³⁶ Although Commerce argued that the total AFA rate was justifiable because all of the information on the record that Gerber submitted was unreliable due to the fact that Gerber had misrepresented its relationship with an affiliated exporter of the subject merchandise it produced, the CIT rejected this argument and invalidated the total AFA rate.²³⁷ In doing, the CIT concluded that assignment of a total AFA rate to Gerber “required Commerce to ignore evidence on the record unfavorable to its desired outcome and to act in the absence of required findings of fact,” and that, therefore, the rate was unsupported by substantial evidence.²³⁸ The underlying reasoning of this conclusion was that Commerce lacked substantial evidence for its finding that Gerber’s misrepresentation rendered all of the evidence that it had submitted as to its actual rate of dumping “unreliable,” and thus, not verifiable, under 19 U.S.C. § 1677m(e).²³⁹ Even though § 1677m(e) does not apply when Commerce finds that a respondent has

233. *Id.*

234. URAA Statement of Administrative Action, *supra* note 31, at 4198.

235. *Hebei Jiheng Chemicals Co. v. United States*, 161 F. Supp. 3d 1322, 1330 (Ct. Int’l Trade 2016) (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)).

236. 387 F. Supp. 2d 1270, 1272-73 (Ct. Int’l Trade 2005).

237. *Id.* at 1284.

238. *Id.* at 1290.

239. *Id.* at 1279.

not acted to the best of its ability, as discussed *supra*²⁴⁰ and as Commerce did here, the CIT found that the non-cooperation finding did not apply to evidence Gerber provided that substantiated its claim that it was free from government control—ruling that the misrepresentation “uniquely concerns the terms and execution of the export agency agreement” between Gerber and its affiliate, it did not apply beyond that finding.²⁴¹

Similarly, in *Since Hardware (Guangzhou) Co. v. United States*, Commerce applied an AFA rate to a respondent that had “submitted false and fraudulent documentation” of its market economy purchases, an offense worse than that committed in *Gerber Food*.²⁴² Although the respondent was clearly non-cooperative and its non-cooperation had resulted in depriving Commerce of credible information the agency needed to determine its dumping rate, the CIT followed *Gerber Food* and ruled that Commerce could not rescind the respondent’s separate rate status.²⁴³ Reasoning that “Commerce may not stray too far from the questionnaire responses that justified the use of AFA,” the CIT made clear that the fraudulent responses with regard to the exporter’s factors of production had no bearing on the information it submitted establishing its independence from government control, and thus, eligibility for separate rate status.²⁴⁴ The CIT recently affirmed this approach in *Fresh Garlic Producers Association v. United States*, rejecting Commerce’s finding that a respondent’s failure to support its quantity and value information did not mean that Commerce could reject its separate rate certification without adequately explaining why the certification could not be trusted.²⁴⁵ Although the CIT has been less forgiving in cases like *Koehler* that do not involve separate rate determinations, cases involving separate rate respondents like *Gerber Food* and its progeny evidence that the Federal Circuit and the CIT will at least sometimes question Commerce’s finding that all information submitted by a

240. *Supra* Part III.A.

241. *Gerber Food (Yunnan) Co., Ltd. v. United States (Gerber Food)* 387 F. Supp. 2d 1270, 1282-83 (Ct. Int’l Trade 2005).

242. 34 C.I.T. 1262, 1266 (Ct. Int’l Trade 2010); see *Qingdao Taifa Grp. Co. v. United States (Taifa I)*, 637 F.Supp.2d 1231, 1240-41 (Ct. Int’l Trade 2009); *Qingdao Taifa Grp. Co. v. United States (Taifa II)*, 710 F. Supp.2d 1352, 1255-58 (Ct. Int’l Trade 2010).

243. *Hardware (Guangzhou) Co.*, 34 C.I.T. at 1274.

244. *Id.* at 1270-71, *4 (“Put another way, the evidence that the company was not controlled by the government . . . is far removed from questions relating to the origin of the factors of production and their costs.”).

245. *Fresh Garlic Producers Ass’n v. United States*, 121 F. Supp. 3d 1313, 1327-28 (Ct. Int’l Trade 2015).

respondent is unreliable just because some parts of it are unreliable.²⁴⁶ Further, where there is no clear misrepresentation—for instance, where a respondent has merely been careless in its submissions, not fraudulent, as was the case in *Gerber Food, Since Hardware*, and *Fresh Garlic*—the Federal Circuit and the CIT have room to be even more forgiving.²⁴⁷

Similarly, when Commerce applies partial AFA, *i.e.*, it has not disregarded all information provided by the respondent as unreliable, it can only disregard the information that it has determined to be deficient. For instance, in the second and third remands of *Dongguan Sunrise Furniture Co. v. United States* (“*Dongguan II*,” “*Dongguan III*”), the CIT invalidated Commerce’s application of partial AFA where it had calculated a dumping margin for a respondent using its own data to stand-in for the margin of respondent’s unreported sales.²⁴⁸ In *Dongguan II*, Commerce selected an AFA rate based on the single highest transaction-specific margin below 216.01% in each CONNUM to reach a partial AFA rate of 182.15%.²⁴⁹ However, Commerce rejected the transaction-specific rate selected for each CONNUM accounted for less than one percent of total sales.²⁵⁰ In *Dongguan III*, Commerce tried again, calculating a partial AFA rate based on the highest-transaction specific margin in each CONNUM that was both below 216.01% and where at least 0.04% of total reported sales were dumped at that margin, reaching a partial ADA rate of 41.75%.²⁵¹ However, Commerce, too, rejected this rate, finding

246. See *Koehler*, 7 F. Supp. 3d at 1314-15 (upholding Commerce’s use of total AFA and distinguishing *Gerber* because it had concealed home market sales).

247. *But see Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307-08 (Fed. Cir. 2014) (upholding Commerce’s finding to apply total AFA and disregard all information submitted by a respondent because respondent failed to provide product-specific sales and cost information). Because the information of which Commerce was deprived was “not limited to a discrete category of information,” and so “core” to its analysis that it “[left] little room for the substitution of partial facts without undue difficulty,” Commerce, even absent misrepresentation or fraud, was justified in applying total AFA so as to ignore the record information that the respondent did present. *Id.*

248. See *Dongguan Sunrise Furniture Co. v. United States* (*Dongguan II*), 904 F. Supp.2d 1359 (Ct. Int’l Trade 2013); *Dongguan Sunrise Furniture Co. v. United States* (*Dongguan III*), 931 F. Supp.2d 1346 (Ct. Int’l Trade 2013). Unlike in *Dongguan I*, Commerce did not have to corroborate the information used in this case because it used the respondent’s own information; it did, however, have to meet the substantial evidence requirement. See *Dongguan II*, 904 F. Supp.2d at 1363-64.

249. *Dongguan II*, 904 F. Supp.2d at 1361.

250. *Id.* at 1363, n.3. *But see Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (upholding a partial AFA rate based on only a single sale and rejecting respondent’s argument that the sale representing only 0.04% of its total sales and the only sale with the dumping margin that Commerce had assigned).

251. *Dongguan III*, 931 F. Supp.2d at 1349.

that 0.04% was too small a percentage of total sales.²⁵² Because the record “contain[ed] verifiable sales data relating to the same type of products, from the same producer, and during the same period of time as the unreported sales,” it was unacceptable for Commerce to ignore this information.²⁵³ Finally, in *Dongguan IV*, where Commerce used the highest 50% of all transaction-specific margins for each CONNUM to calculate a partial AFA rate of 41.30%, Commerce affirmed the result to be supported by substantial evidence because it “relied on a much greater percentage of sales.”²⁵⁴ A similar holding of Commerce’s feet to the fire occurred in *Qingdao Taifa Grp. Co. v. United States* (“*Taifa III*”) where Commerce, in attempt to avoid yet another remand, Commerce reviewed an AFA rate of 227.73% that has been calculated using respondent Taifa’s own sales, but which, according to the CIT, was unsupported by substantial evidence, and that, in its remand redetermination, Commerce should select a rate “somehow grounded in the realities of [the] industry.”²⁵⁵

In subsidies investigations, similar requirements apply. For instance, in *Kam Kiu*, discussed *supra*,²⁵⁶ the CIT also reviewed Commerce’s finding that Kam Kiu had used an export rebate program alleged by respondents that it had found voluntary respondents to have used despite evidence that Kam Kiu placed on the record that it could not have used the program, evidence that “detract[ed] from Commerce’s finding”; and despite an explanation of how Kam Kiu “could have availed itself of the benefits of this program.”²⁵⁷ However, because Commerce explained in its remand redetermination that Kam Kiu was located in the same province as the voluntary respondent that used the program, thus allowing Commerce to permissibly infer that it, too, could have used the program.²⁵⁸ In a path-breaking recent case, *Trina Solar*, discussed *supra* in regard to its non-cooperation finding,²⁵⁹ the CIT ruled that Commerce, even when applying AFA, “must still make the necessary factual findings to satisfy the requirements of countervailability

252. *Id.* at 1356.

253. *Id.*

254. *Dongguan Sunrise Furniture Co. v. United States*, 36 I.T.R.D. 1686, 2015 WL 179003 at *2, 4 (Ct. Int’l Trade 2015).

255. 34 C.I.T. 1435, 1443 (Ct. Int’l Trade 2010).

256. *Supra* Part III.B.1.

257. *Kam Kiu I*, 58 F. Supp.3d at 1396.

258. *Kam Kiu II*, 125 F. Supp.3d at 1350.

259. *Supra* Part III.A.

[i.e., financial contribution, benefit, and specificity].”²⁶⁰ Here, the CIT went beyond just requiring Commerce not to ignore record information, reading the requirement to also place a burden on Commerce to support its AFA-driven fact-finding by pointing to support in the record.

According to the CIT in *Trina Solar*, “[b]y bypassing the prerequisite factual findings to reach the legal conclusion purely ‘as AFA,’ Commerce illegally circumvents its obligation to make determinations that are supported by a reasonable reading of the record, including consideration of the relevant evidence that “fairly detract[s]” from the reasonableness of its conclusions.”²⁶¹ In doing, Commerce, even if it is not required to query a non-cooperative foreign government or individual company once more, must nevertheless search “the far reaches of the record”—and may re-open the record—to make the prerequisite factual findings.²⁶² Applying this standard to twenty-seven unreported subsidies that Commerce discovered only at verification, the CIT remanded to Commerce because Commerce had “improperly reached legal conclusions without the support of requisite factual findings” where it did not point to information on the record to support its conclusion that each of the subsidies was countervailable.²⁶³ On remand, Commerce examined all twenty-seven programs, finding that the respondent had received a payment for each of the programs, thereby evidencing a financial contribution; and that China, the subsidizing government, had developed several programs to develop the renewable energy and science and technology industries (in doing, Commerce pointed to “several laws, economic measures, and economic incentives”), thereby evidencing that the programs under the auspices of which the discovered payments were issued were specific.²⁶⁴ Although the evidence to which Commerce pointed in the remand redetermination was not particularly overwhelming, that *Trina Solar* requires that Commerce must do more in subsidies investigations than simply conclude purely as AFA that a financial contribution and benefit has been conferred has provided a meaningful opening that the Federal Circuit and the CIT may use in the future to require, at the very least, more explanation from Commerce when it applies AFA in subsidy proceedings.

260. *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 195 F. Supp.3d 1334, 1350 (Ct. Int’l Trade 2016).

261. *Id.*

262. *See id.* at 1350.

263. *Id.* at 1349-50.

264. *Changzhou Trina Solar Energy Co. v. United States (Trina II)*, 264 F. Supp. 3d 1325, 1335-36 (Ct. Int’l Trade 2017).

Another very important and overarching limit gaining currency with both the Federal Circuit and the CIT in recent years is that neither the decision whether to apply partial or total AFA nor the rate that Commerce determines should be purposely punitive: “[T]he purpose of section 1677e(b) is to provide respondents incentive to cooperate, not to impose punitive . . . margins.”²⁶⁵ Although Commerce may sometimes look to the words of Commerce to determine if the purpose of the rate is punitive, the inquiry is usually conflated with substantial evidence review. Where AFA rates are so high that it might be inferred that Commerce’s purpose in applying them is punitive, the Federal Circuit and the CIT may be more scrutinizing of Commerce’s fact-finding. To this end, the Federal Circuit and the CIT have been particularly critical of AFA rates over 100%, the CIT in one case stating that “[w]hen rates are in multiples of 100%, one might assume that a bit more . . . record support is warranted.”²⁶⁶ In another case, the CIT ruled that when rates are over 100 percent and higher than that calculated for cooperating respondents in the same investigation or review, “Commerce must provide a clear explanation for its choice and ample record support for its determination.”²⁶⁷ In other words, the CIT reasoned, “[a]s the rate become larger and greatly exceeds the rates of cooperating respondents, Commerce must provide a clearer explanation for its choice and ample record support for its determination.”²⁶⁸ It is thus fair to say that, in general, the higher the rate, the more evidence Commerce ought to produce for it to survive substantial evidence review.

Further, where Commerce has assigned a non-cooperative respondent one AFA rate, and then, in a subsequent proceeding, applies an even higher AFA rate, Commerce must explain why the higher rate is now necessary to deter non-compliance and, therefore, is not punitive.²⁶⁹ For instance, in *Shandong II*, Commerce calculated an AFA rate of 45.42% in a

265. De Cecco, 216 F.3d at 1032; *see also* Essar Steel, 678n F.3d at 1276; *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307-08 (Fed. Cir. 2014).

266. *See* *Qingdao Taifa Grp. Co. v. United States (Taifa III)*, 34 C.I.T. 1435, 1443 & n.7 (Ct. Int’l Trade 2010) (“Thin air is not evidence supporting a dumping margin, particularly one of almost 400%.”). *But see* *Hubscher Ribbon Corp. v. United States*, 979 F. Supp. 2d 1360, 1370 (Ct. Int’l Trade 2014) (upholding a 247.65% rate because the non-cooperative respondent knew at the time they withdrew from the review that Commerce had limited other data on which to base an AFA rate).

267. *See* *Lifestyle Enter. v. United States*, 768 F. Supp. 2d 1286, 1298 (Ct. Int’l Trade 2011) (ordering Commerce to further explain its determination of an AFA rate of 216%).

268. *Id.*

269. *See, e.g., Shandong Mach. Imp & Exp. Co. v. United States (“Shandong II”)*, 34 C.I.T. 1001, 1006, 2010 WL 3199830, at *4 (Ct. Int’l Trade 2010).

prior review that Commerce at the time determined “sufficient to ensure future compliance.”²⁷⁰ However, in a later review, it increased this rate to 109.06%.²⁷¹ In *Kam Kiu*, the CIT articulated a similar requirement, stating that Commerce must either explain how AFA rates rely to non-cooperative respondents or “why [they are] necessary to deter non-compliance.”²⁷²

While the TPEA amendments to the AFA statute mainly targeted the corroboration requirement, they also affected substantial evidence review because, to the extent that the TPEA relieves Commerce from any obligation to calculate “reasonably accurate estimates” for non-cooperative respondents, it also weakens substantial evidence review. As 19 U.S.C. § 1677e(d)(3)(A) applies not just to the corroboration requirement, but to Commerce’s obligation to estimate reasonably accurate rates “for *any* other purpose,” it obviates the need for Commerce provide substantial evidence to show that its AFA findings are “reasonably accurate estimates” of actual margins, which Commerce did in the *Dongguan* cases, discussed *supra*,²⁷³ and even in *Kam Kiu*, where the CIT also cited this obligation.²⁷⁴ The CIT’s recent decision in *Özdemir*, where the CIT emphasized that Commerce is relieved of this obligation for “*any other purpose*,” makes this all the clearer.²⁷⁵

If the TPEA alone was not enough, the Federal Circuit in *Nan Ya Plastics Corp. v. United States*, a pre-TPEA case, also relieves Commerce from any obligation to calculate reasonable estimates of respondents’ actual rate of dumping or subsidization.²⁷⁶ In *Nan Ya*, where Commerce applied an AFA rate using primary information and thus did not have to corroborate the rate it selected, the Federal Circuit ruled that Commerce is within its rights under *Chevron* to determine that a rate is “‘accurate’ if it is correct as a mathematical and factual matter, [and thereby] supported by substantial evidence,” and that it “reflects ‘commercial reality’ if it is consistent with the method provided in the statute.”²⁷⁷ According to the Federal Circuit, “[w]hen Congress directs the agency to measure pricing behavior . . . [it] need not examine the economic or commercial activity of the parties specifically, or of the

270. *Id.*

271. *Id.* at 1003.

272. *Kam Kiu I*, 58 F. Supp.3d at 1396.

273. *Supra* Part III.B.1

274. *Kam Kiu I*, 58 F. Supp.3d at 1392.

275. *Özdemir Boru San. ve Tic. Ltd. Sti v. United States*, 273 F. Supp. 3d 1225, 1248 (Ct. Int’l Trade 2017) (emphasis in opinion).

276. 810 F.3d 1333 (Fed. Cir. 2016).

277. *Id.* at 1344.

industry more generally, in some broader sense.”²⁷⁸ To this end, *Nan Ya* goes further than *De Cecco* and earlier cases, leaving it difficult to determine what is left of *De Cecco*’s general requirement that rates be “reasonable.”

Yet, despite the TPEA and *Nan Ya*, the basic premise that Commerce still may not ignore record information remains intact, at least not where it is in clear contradiction to Commerce’s conclusion and the reliability of the evidence. This is because even if Commerce may not be required to proactively examine the economic situation of respondents or the larger industry to which they belong, still left is *De Cecco*’s general requirement that the rate be “reasonable” and “supported by substantial evidence,” *i.e.*, Commerce is still under an obligation to “assure a reasonable margin” that has “some relationship to the respondent’s actual margin.”²⁷⁹ Therefore, and as will be discussed in Part V, regardless of *Nan Ya*’s frustration with *De Cecco* and its progeny, which the Federal Circuit derided as illegally adding additional procedures that Congress did not intend, not all is lost.

IV. WTO CHALLENGES TO INVESTIGATING AUTHORITIES’ USE OF FA AND AFA

As mentioned earlier, the United States implemented both the WTO Anti-Dumping Agreement (“AD Agreement”) and the Subsidies and Countervailing Measures Agreement (“SCM Agreement”) through the URAA, which amended 19 U.S.C. § 1677e. While the Federal Circuit and the CIT have reviewed Commerce’s AFA determinations under the implementing statute, the WTO Appellate Body (“AB”) and WTO Panels have reviewed Commerce’s AFA determinations under the AD and SCM Agreements, which were drafted, in part, to address the displeasure of other WTO members regarding Commerce’s use of “facts otherwise available,” including AFA, in dumping and subsidies investigations.²⁸⁰ The relevant articles pertaining to FA are Article 6.8 of the

278. *Id.*

279. *F. Ili De Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (“Congress could not have intended for Commerce’s discretion to include the ability to select unreasonably high rates with no relationship to the respondent’s actual dumping margin.”).

280. *See Andrews, supra* note 26, at 16-18. This said, other WTO Members also engage in practices similar to AFA. For instance, the European Union and Brazil both assign the petition rate to respondents who clearly do not cooperate in an investigation, *i.e.*, do not submit any information at all. *See VAN BAELE & BELLIS, EU ANTI-DUMPING AND OTHER TRADE DEFENCE INSTRUMENTS* 474 (5th ed. 2011) (discussing the EU’s use of facts and adverse facts available); INTERNATIONAL TRADE CENTRE, *BUSINESS GUIDE TO TRADE REMEDIES IN BRAZIL: ANTI-DUMPING, COUNTERVAILING AND SAFEGUARD LEGISLATION, PRACTICES AND PROCEDURES* 3 (2009).

AD Agreement and Article 12.7 of the SCM Agreement, which address the use of evidence in dumping and subsidies proceedings, respectively.²⁸¹ Both articles are nearly identical, reading that “in cases where an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, determinations, affirmative or negative, may be made on the basis of *facts available*.” Additionally, Annex II of the AD Agreement, which also guides interpretation of the SCM Agreement, addresses procedures that WTO members are to follow when they make determinations on the basis of facts available in dumping and subsidies proceedings. WTO case law has found Annex II of the AD Agreement to apply to the use of facts available in subsidies cases as well given “the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.”²⁸² Therefore both agreements contain constraints similar to those described above in the United States law context as to *when* and *how* Commerce an apply facts available, including AFA.

In terms of AFA, the AD and SCM Agreements are silent.²⁸³ The United States rests its authority to apply AFA on the text of Annex II:7, which provides that “if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.” However, the provision makes no reference

Interestingly, however, even when this is the case, the EU will attempt to cross-check the information alleged in the petition with publicly available sources. See VAN BAEL & BELLIS, at 474-76.

281. See AD Agreement, *supra* note 6, art. 6.8; SCM Agreement, *supra* note 6, art. 12.7.

282. WTO case law has found Annex II of the AD Agreement provide “additional context for the interpretation of Article 12.7.” *US–Carbon Steel (India)*, *supra* note 9, ¶ 4.423. This is because there is a “need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures”. Appellate Body Report, *Mexico–Definitive Anti-Dumping Measures on Beef and Rice from the United States* ¶¶ 289-95, WTO Doc. WT/DS295/AB/R (adopted Dec. 20, 2005) [hereinafter *Mexico–Rice*]; see also World Trade Organization, Ministerial Declaration of 15 December 1993, *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*. Indeed, in *Mexico–Rice*, the Appellate Body stated that “it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of ‘facts available’ in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.” See *Mexico–Rice* ¶ 295.

283. Appellate Body Report, *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, 29 n.45, WTO Doc. WT/DS184/AB/R (adopted Aug. 31, 2001) [hereinafter *US–Hot-Rolled Steel*] (“[T]he term ‘adverse’ does not appear in the Anti-Dumping Agreement in connection with the use of facts available. Rather, the term appears in the provision of the United States Code that applies to the use of facts available.”).

to adverse inferences and could simply be interpreted to mean that when a party does not cooperate, the antidumping or countervailing duty margin that is yielded as a result of an investigating authority being forced to resort to facts available might be more adverse to the non-cooperative party than the result that would have been reached if the party had cooperated. This was the conclusion of the Panel in *China–GOES*, which found “no basis in Annex II for the drawing of adverse inferences.”²⁸⁴

For its part, the AB has in the past expressed skepticism about AFA, refraining to consider “whether, or to what extent, it is permissible, under the Anti-Dumping Agreement, for investigating authorities *consciously* to choose facts available that are *adverse* to the interests of the parties concerned.”²⁸⁵ Yet the AB and WTO Panels have also eschewed finding 19 U.S.C. § 1677e to be an “as such” violation of the AD and SCM Agreements, finding that while Commerce’s use of AFA may be inconsistent with the United States’ WTO obligation in individual instances, “this does not entail, *ipso facto*, that the statute . . . is itself inconsistent.”²⁸⁶ In other words, because Commerce has discretion in terms of when and how it applies AFA (*i.e.*, Commerce’s application of AFA is discretionary, not mandatory), Commerce could apply AFA only when and how doing so would be consistent with the United States’ WTO obligations.²⁸⁷ Most recently, at the end of 2014, in *United States–*

284. Panel Report, *China–Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 7.302, WTO Doc. WT/DS414/R (adopted Nov. 16, 2012) [hereinafter *China–GOES*] (“In our view, the use of facts available should be distinguished from the application of adverse inferences. While paragraph 7 of Annex II of the Anti-Dumping Agreement states that non-cooperation by an interested party ‘could lead to a result which is less favorable to the party than if the party did cooperate,’ we see no basis in Annex II for the drawing of adverse inferences. In our view, the purpose of the facts available mechanism is not to punish non-cooperation by interested parties. As explained by the Appellate Body, the purpose of Article 12.7 of the SCM Agreement is rather to ‘ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation,’ in the sense that ‘the provision permits the use of facts on record solely for the purpose of replacing information that may be missing.’”) (citing *Mexico–Rice*, *supra* note 282, ¶ 293).

285. *US–Hot-Rolled Steel*, *supra* note 283, at 29 n.45 (emphasis in original). According to the AB, it “use[d] the term ‘adverse’ facts available simply to denote that the facts available used by [Commerce], in this case . . . increased the respective dumping margins of [the respondents], that is, they had an ‘adverse’ impact on those margins from the point of view of the companies concerned.” *Id.*

286. Panel Report, *United States–Anti-Dumping and Countervailing Measures on Steel Plate from India*, ¶ 7.99, WTO Doc. WT/DS206/R (adopted July 29, 2002) [hereinafter *US–Steel Plate*].

287. *See id.* ¶¶ 7.93-99; *see also US–Carbon Steel (India)*, *supra* note 9, ¶ 4.469 (“On its face, . . . the [AFA statute] is framed in permissive terms. In particular, it states that the investigating authority ‘may use an inference that is adverse to the interests of that party.’ We consider that, in the light of

Carbon Steel (India), the AB once more rejected an “as such” challenge to the AFA statute, finding that not only did the statute not dictate that Commerce apply AFA in a WTO-inconsistent fashion, but also that India had failed to demonstrate that the United States’ practice of applying AFA was so consistently applied as to give rise to an “as such” violation.²⁸⁸

Of course, the AB’s position not to find the AFA statute an “as such” violation of the AD and SCM Agreements does not preclude challenging Commerce’s AFA findings “as applied,” which has, in *US–Hot-Rolled Steel*, been done successfully before.²⁸⁹ Limits on *when* investigating authorities may resort to facts available and *how* they may use those facts remain important limits on Commerce’s authority to apply AFA in accordance with WTO law just as they do in United States law.

A. *Limits on When Investigating Authorities May Resort to Facts Available*

On the question of *when* an investigating authority applies facts available, cooperation does not have much bearing. As the AB made clear in *US–Hot-Rolled Steel*, Annex II:7 of the AD Agreement does not free Commerce to disregard information and apply FA, let alone AFA, simply because an investigating authority has deemed an interested party to have failed to cooperate. Citing Annex II:3 as the applicable authority as to when investigating authorities “are entitled to reject information submitted by interested parties,” the AB ruled that FA can only be applied when information submitted is not 1) “verifiable,” 2) “appropriately submitted so that it can be used in the investigation without undue difficulties,” 3) “supplied in a timely fashion,” and 4) “supplied in a medium or computer language requested by authorities.”²⁹⁰ Therefore, an

this permissive framing of the test of the measure, the use of the inference is capable of being limited to those instances where it accords with the legal standard of Article 12.7 of the SCM Agreement.”).

288. *US–Carbon Steel (India)*, *supra* note 9, ¶¶ 4.471-82. Finding that the WTO Panel had failed to comply with its obligation under Article 11 of the Dispute Settlement Understanding, the AB, unlike the Panel, reviewed not just the text of the statute, but also the legislative history of the AFA statute, including the SAA, as well as judicial decisions and Commerce determinations, including *Essar Steel* and *Mueller Comercial de Mexico*, discussed *supra* Part III, to ultimately affirm the Panel’s finding that Commerce’s application of AFA is discretionary, not mandatory. *Id.* In doing so, it “note[d] that the United States placed a number of cases on the Panel record where the ‘worst possible inference’ was not applied in instances of non-cooperation. On their face these instances appear to demonstrate that, in cases of non-cooperation, it is possible for an investigating authority to use facts other than those reflected by the worst possible inference.” *Id.* ¶ 4.480.

289. *US–Hot-Rolled Steel*, *supra* note 283, ¶ 70.

290. *Id.* ¶¶ 80-81.

investigating authority may not disregard respondents' information and apply FA merely because it has found a respondent non-cooperative; conversely, even where a respondent is cooperative, an investigating authority may be forced to apply FA.²⁹¹ In short, an investigating authority's decision to apply FA does not turn on cooperation alone.

This, however, does not mean that cooperation is irrelevant. In *US–Hot-Rolled Steel*, the AB affirmed the finding of the Panel that “[i]n the absence of a justified conclusion that there was a lack of cooperation, there is no basis under paragraph 7 of Annex II for a result which is less favorable than would have been the case had the party cooperated.”²⁹² In *US–Hot-Rolled Steel*, Commerce had determined to apply AFA because a respondent had failed to provide the prices at which its products were first sold to an unaffiliated party in the United States, information that was necessary for Commerce to calculate a constructed export price and which was in the possession not of the respondent, but an entity of which the respondent was but one partner in a joint venture.²⁹³ Although the respondent had attempted to gain the information from the joint venture by scheduling a meeting with the joint venture and sending five separate letters over a period of thirteen weeks, Commerce concluded that the respondent had failed to cooperate despite the fact that Commerce “did not take any steps to assist [the respondent] in obtaining the information, nor did [it] request [the joint venture partner] to supply the information to it directly.”²⁹⁴ In interpreting Annex II:7, the AB turned to Annex II:5, which provides that investigating authorities must not reject information that is “not ideal in all respects” if the “interested party has acted to the best of its ability.”²⁹⁵ Using this standard to interpret non-cooperation, the AB reasoned “that the level

291. See *US–Steel Plate*, *supra* note 286, ¶¶ 7.64-65 (“We find it difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability. This would seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority’s satisfaction.”); see Panel Report, *Egypt–Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, ¶ 7.242, WTO Doc. WTO/DS211/R (adopted Oct. 1, 2002) [hereinafter *Egypt–Steel Rebar*] (finding the same).

292. *US–Hot-Rolled Steel*, *supra* note 283, ¶ 95 (quoting Panel Report, *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 7.73, WTO Doc. WT/DS184/R (adopted Feb. 28, 2001)).

293. *Id.* ¶¶ 91-92.

294. *Id.*

295. *Id.* ¶ 100.

of cooperation required of interested parties is a high one—interested parties must act to the ‘best’ of their abilities.”²⁹⁶

Yet the AB did not stop its analysis here. Rather, it went on to conclude that the requirement of Annex II:7 is a “detailed expression of the principle of good faith, which is, at once, a general principle of law and a principle of general international law, that informs the provisions of the Anti-Dumping Agreement,” and which, in regard to Annex II:7, “restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable.”²⁹⁷ Turning to Annex II:2 and 5, in addition to Article 6.13 of the AD Agreement’s requirement that “authorities shall take *due account of any difficulties experienced by interested parties*, in particular small companies, in supplying the information requested, *and shall provide any assistance practicable*,” the AB opined,

‘[C]ooperation’ is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to ‘take due account’ of genuine ‘difficulties’ experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation.²⁹⁸

Because Commerce had itself acknowledged that the respondent “ha[d] provided a great deal of information and substantially cooperated in respect to other issues’ and that, with respect to the missing information, ‘[had] made some effort to obtain the data and [the joint venture partner had] rebuffed these efforts,’” the AB found Commerce’s non-cooperation finding unsupported.²⁹⁹ Further, the

296. *Id.*

297. *Id.* ¶ 101.

298. *Id.* ¶¶ 101-04 (emphasis in original). Annex II:2 requires investigating authorities to “consider the reasonable ability of the interested party to respond in a preferred medium or computer language,” laying out limits on what investigating authorities may expect from respondents that do not maintain computerized records. AD Agreement, *supra* note 6, Annex II:2.

299. *Id.* ¶¶ 105-07. Commerce had found that “it cannot be said that [the respondent] was *fully* cooperative and made *every effort* to obtain and provide the requested information.” *Id.* Further complicating matters and increasing sympathy for the respondent in this situation, the joint venture partner was one of the petitioners that brought the case against respondents, and thus, of course, was incentivized not to provide the requested information to Commerce. *Id.* ¶ 107.

AB rejected Commerce's understanding of cooperation, ruling that "the very considerable lengths in pursuit of the necessary information" that Commerce expected were, as the Panel found, "far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II."³⁰⁰

In turning to Annex II:2 and 5 and Article 6.13, which place burdens on the investigating authority to not unduly reject respondents' information, the AB, as two commentators have noted, "might well have added that the threshold [for finding a respondent non-cooperative] is subjective, in that the focus is not on a hypothetical reasonable respondent, but in what could, and could not, have been expected of the individual respondent in the case."³⁰¹ This is in some ways a far cry from how U.S. courts have interpreted the standard of cooperation set forth in *Nippon Steel*, discussed *supra*,³⁰² to be an objective standard devoid of consideration of the unique difficulties faced by the respondent in a given case.³⁰³

Since *US–Hot-Rolled Steel*, the AB and WTO Panels have been considerably more understanding of the difficulties faced by individual respondents and have been more inclined to reject investigating authorities' use of FA when objections to investigating authorities are reasonable in light of the unique facts underlying a particular case.³⁰⁴ In doing so, the AB and WTO Panels have tended to shift more of the burden toward investigating authorities and away from respondents when compared to U.S. courts, focusing analysis largely around 1) whether investigating authorities have met their obligation to issue proper deficiency notices and allowed opportunities for respondents to remedy deficiencies under Annex II:1, 2) whether investigating authorities are justified in their rejection of information under Annex II:3, *i.e.*, whether information is actually either unverifiable, not "appropriately submitted so that it can be used without undue difficulties," or not "supplied in a timely fashion"; and 3) whether the information

300. *Id.* ¶¶ 108-09 (quoting Panel Report, WT/DS184/R, ¶ 7.73).

301. Raj Bhalla & David Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457, 584 (2002).

302. *Supra* Part III.A.

303. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003). Though, of course, in the same breath that *Nippon Steel* articulates an objective standard it also requires it "reasonable for Commerce to expect that more forthcoming responses should have been made" before Commerce can apply AFA. *See id.*

304. *See, e.g.*, Panel Report, *Guatemala–Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, ¶ 8.251, WTO Doc. WT/DS/156/R (adopted Nov. 17, 2000) [hereinafter *Guatemala–Cement II*].

requested was, in fact, “necessary” to the investigation within the meaning of the word as used in Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

1. Deficiency Notices

Annex II:1 states that investigating authorities must “specify in detail” the information they require from respondents and must, when that information is “not supplied within a reasonable time,” issue notice to respondents of the deficiency that informs them of the possibility that FA may be applied. This requirement functions very similar to the requirement to issue a deficiency notice under U.S. law. In *Mexico–Rice*, for instance, the AB upheld the Panel’s finding that Mexico had violated Annex II:1 when it applied FA to known U.S. exporters that it did not individually investigate despite neither ever notifying them of the investigation nor requesting information from them.³⁰⁵

More so, when investigating authorities do request information from respondents, the request must be clear enough to alert the respondent what information it is being required to produce, including what supporting documentation may be required.³⁰⁶ For instance, general references to provide supporting documentation at the beginning of a questionnaire are not sufficient to put respondents on notice of what information is required.³⁰⁷ Investigating authorities must also be specific in their requests for information, and they must also be specific as to why information submitted is deficient and allow respondents an opportunity to address the deficiency “before the investigating authority may resort to facts available.”³⁰⁸ In *China–Autos (US)*, a recent case, a

305. *Mexico–Rice*, *supra* note 282, ¶¶ 259-261. However, the requirements to notify exporters that are unknown to an investigating authority are understandably less stringent. For instance, in *China–Broiler Products*, a Panel found that China satisfied its obligation under Annex II:1 when it posted notice of the investigation on its website, informing unknown U.S. respondents that FA may be used in the event that exporters did not register on and submit certain information through its website. Panel Report, *China–Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, ¶ 7.306, WTO Doc. WT/DS427/R (adopted Sept. 25, 2013) [hereinafter *China–Broiler Products*].

306. Panel Report, *Argentina–Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy*, ¶¶ 6.54-57, WTO Doc. WT/DS189/R (adopted Nov. 5, 2001) [hereinafter *Argentina–Ceramic Tiles*].

307. *Id.* ¶ 6.66.

308. Panel Report, *European Communities–Anti-Dumping Measure on Farmed Salmon from Norway*, ¶ 7.455 WTO Doc. WT/DS337/R (adopted Jan. 15, 2008) [hereinafter *EC–Salmon (Norway)*]. Note that Annex II:6 of the AD Agreement lays out a similar obligation when investigating authorities reject information pursuant to Annex II:3, requiring that “[i]f evidence or other information is not accepted, the supplying party should be informed forthwith of the reasons

Panel found that even though public notice and request for information from unknown exporters on an investigating authorities' website may satisfy the notice requirement, the notice must do more than simply ask the unknown exporter its identity and the quantity and value of its exports of the subject product.³⁰⁹ According to the Panel, the scope of facts available used should not be wider than the scope of the information requested, such that, if China were to use more than quantity and value information in its facts available analysis, it must request more than quantity and value information.³¹⁰ Although notice challenges are relatively simple challenges to make, they still play a large part in challenging FA determinations.

2. Undue Rejection of Information

These challenges stem from the heart of the AB's ruling in *US–Hot-Rolled Steel*, which makes clear that an investigating authority may only reject respondents' information and apply FA when the information provided is unverifiable, not "appropriately submitted so that it can be used without undue difficulties," or not "supplied in a timely fashion." This rule is akin to 19 U.S.C. § 1677m(e)'s requirement that Commerce accept information that is timely submitted, verifiable, "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination," and that "can be used without undue difficulties," save that, unlike § 1677m(e), and as the AB has made clear, there is no exception should the investigating authority find that the respondent did not "act[] to the best of its ability."³¹¹ As an extension of this rule, and similar to the CIT's position in *Gerber Food* and the other separate rate cases discussed in Part III.B., investigating authorities are

therefor, and should have an opportunity to provide further explanations within a reasonable time." AD Agreement, *supra* note 6, Annex II:6; see *Egypt–Steel Rebar*, *supra* note 291, ¶ 7.260-62 (finding Egypt to have violated Annex II:6 when it did not flatly inform respondents that their response was being rejected, instead merely asking them "to provide a few missing pieces of information" such that they "were left with the impression that their responses . . . had been accepted."). However, note that Annex II:6 does not give respondents "a second chance to submit information," for, if respondents had this right, investigations "might carry on indefinitely." See Panel Report, *Korea–Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, ¶ 7.85, WTO Doc. WT/DS312/R (adopted Nov. 28, 2005) [hereinafter *Korea–Certain Paper*].

309. Panel Report, *China–Anti-Dumping and Countervailing Duty Measures on Certain Automobiles from the United States*, ¶¶ 7.136-140, WTO Doc. WT/DS440/R (adopted June 18, 2014) [hereinafter *China–Autos (US)*]. The Panel distinguished the case from *China–Broiler Products*, discussed *supra* note 305, finding that there "the panel did not describe or discuss the contents of the notice it found sufficient." *Id.* 49 n.222.

310. *China–Autos (US)*, *supra* note 309, ¶ 7.136.

311. See *supra* note 292.

not able to reject all of a respondent's information simply because some of it is deficient.³¹² Not surprisingly, these issues are at the center of any WTO challenge to when an investigating authority uses FA.

Information is verifiable when "the accuracy and reliability of the information can be assessed by an objective process of examination."³¹³ The requirement does not mean that the information submitted is actually subject to an on-the-spot verification. In fact, where investigating authorities do not make a clear request for information before or at verification, making it only after, they are under an obligation to either accept the information as is, verify it through means other than on-the-spot verification, or conduct a second on-the-spot verification.³¹⁴ Further, when on-the-spot verification does occur and deficiencies are revealed, investigating authorities are not entitled to reject all of respondents' information but only that information which has been revealed deficient.³¹⁵

Information is "appropriately submitted so that it can be used without undue difficulties" when difficulties encountered by the investigating authority are "beyond what is otherwise the norm."³¹⁶ Thus, WTO Panels have recognized that whether investigating authorities have the right to reject information because it cannot be used "without undue difficulties" is a highly fact-specific inquiry that occurs within an understanding of investigations as cooperative endeavors between investigating authorities and respondents whereby, as the AB ruled in *US–Hot-Rolled Steel*, cooperation is "a two-way process involving joint effort."³¹⁷ Therefore,

312. *US–Steel Plate*, *supra* note 286, ¶¶ 7.57-58 (rejecting the United States' argument that an investigating authority may reject all of respondents' information merely because it has failed to provide necessary information).

313. *See id.* 26-27 n.67.

314. *See EC–Salmon (Norway)*, *supra* note 308, ¶¶ 7.360-63; *see also Guatemala–Cement II*, *supra* note 304, ¶¶ 6.968-75, 8.252 (finding Guatemala to have violated Annex II:3 when it rejected information solely because respondents had rightfully objected to an on-the-spot verification that included two verifiers who were advisors to a U.S. competitor).

315. Panel Report, *Mexico–Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, ¶ 7.166, WTO Doc. WT/DS331/R (adopted July 24, 2007) [hereinafter *Mexico–Steel Pipes and Tubes*] (finding Mexico to have violated Annex II:3 when it rejected the respondent's entire database, including information related to constructed value, freight charges, and insurance, for which there was "no record evidence of the existence of any problem in respect of the data").

316. *US–Steel Plate*, *supra* note 286, ¶ 7.72 ("[I]t is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own order in order to be able to take into account information that does not fully comply with its request.").

317. *Id.*

investigating authorities have no right to reject information simply because it does not conform exactly to the form or manner requested, *i.e.*, just because it is not “appropriately submitted” according to investigating authorities’ requirements; similarly, respondents must also make a reasonable effort to comply with investigating authorities’ requests.³¹⁸ However, where there is applicable domestic law in place that articulates form and manner requirements, it is more likely that a WTO panel would find that the deficient information is “not appropriately submitted.”³¹⁹

Even if information is verifiable and “appropriately submitted so that it can be used without undue difficulties,” investigating authorities are still entitled to reject it if it is not also “timely submitted.” When information is “timely submitted” has also given rise to WTO litigation, including in *US–Hot-Rolled Steel*, in which the AB found that even information submitted after a deadline established by the investigating authority may still be “timely submitted” if it is submitted within a “reasonable period.”³²⁰ In *US–Hot-Rolled Steel*, while the AB made clear that Commerce could certainly set deadlines, it squarely rejected the notion that Commerce was entitled to reject respondents’ information “*for the sole reason* that it was submitted beyond the deadlines for responses to questionnaires.”³²¹ However, generally speaking, while investigating authorities have an obligation to extend deadlines “‘upon cause shown,’ and if ‘practicable,’” investigating authorities still have wide latitude in setting deadlines, and as recent cases have shown, WTO Panels have largely deferred to investigating authorities when it comes to determining

318. *Id.* (“[I]t is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own order in order to be able to take into account information that does not fully comply with its request.”).

319. *Compare* Panel Report, *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.191, WTO Doc. WT/DS241/R (adopted May 29, 2003) (finding information “not appropriately submitted” because it was not submitted “in accordance with relevant procedural provisions of WTO Members’ domestic laws) *with EC–Salmon (Norway)*, WT/DS337/R, *supra* note 308, ¶¶ 7.366–67 (finding information requested after verification “appropriately submitted” even though it may have been more difficult to verify at a late stage in the investigation).

320. *US–Hot-Rolled Steel*, *supra* note 283, ¶¶ 81–83. The reference to a “reasonable period” comes from Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement, and the Appellate Body has also found, is further bolstered by reference to the requirement in Annex II:1 that FA can only be used if respondents fail to respond to a deficiency notice “within a reasonable time.” *See id.* ¶ 79.

321. *Id.* ¶ 89.

whether information is timely submitted.³²²

3. “Necessary Information”

A third challenge that respondents often make at the WTO is to whether the information requested by investigating authorities is, in fact, “necessary information” as that term is used within the meaning of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement. As has been the case in U.S. law, WTO Panels have afforded investigating authorities a wide degree of discretion, rejecting respondents’ arguments that information requested is unnecessary so long as investigating authorities is “[on] its face . . . plausible.”³²³ Similarly, the Panel in *China–GOES*, although recognizing that investigating authorities are not entitled to apply FA unless they have been deprived of “necessary information,” found that “even information that is only needed to prepare for verification might still be treated as ‘necessary.’”³²⁴ While determining which information is “necessary information” is a fact-specific inquiry “made in light of the specific circumstances of each investigation, not in the abstract” such that “a particular piece of information that may play a critical role in an investigation may not be equally relevant in another one,” the argument is rarely made with success.³²⁵

322. See, e.g., *China–GOES*, *supra* note 284, ¶ 7.289 (rejecting the United States’ argument that respondents’ information was timely submitted because it was submitted by deadline for comments prior to a preliminary determination rather than by the deadline set by the investigating authority in its deficiency notice).

323. See *Egypt–Steel Rebar*, *supra* note 291, ¶ 7.217 (rejecting Turkey’s argument that detailed cost information was unnecessary because the investigating authorities’ request could have been necessary for disregarding below cost sales) (“[R]eading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to “specify . . . the information required from any interested party.”).

324. *China–GOES*, *supra* note 284, ¶ 7.291.

325. See *Korea–Certain Paper*, *supra* note 308, ¶ 7.43. In *United States–Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶¶ 7.273-74, WTO Doc. WT/DS404/R (adopted Sept. 2, 2011), Vietnam successfully argued that quantity and value information for Vietnamese respondents not entitled to a separate rate in an administrative review was not necessary since Commerce had already predetermined that regardless of the quantity and value of their exports, they were to receive the NME Entity-rate. However, in a later rendition of the same challenge, a different WTO Panel came out differently, finding that an NME Entity-rate in an administrative review that was identical to that reached in a prior determination, even if that prior determination was based on FA, was not in fact an FA rate, and thus not subject to the discipline of Article 6.8 and Annex II of the AD Agreement. See Panel Report, *United States–Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶¶ 7.233-35, WTO Doc. WT/DS429/R (adopted Apr. 22, 2015). See also *United States–Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, ¶¶ 5.150-

B. *Limits on How Investigating Authorities Use Facts Available*

The AD and SCM agreements also limit investigating authorities' discretion as to *how* FA is applied. Annex II:7 of the AD Agreement, which, as discussed, is also applicable to the AD Agreement, requires authorities to use "special circumspection" when applying FA. From this general requirement springs three, often overlapping, principal limits that the AB and WTO Panels have placed on investigating authorities' discretion: 1) investigating authorities must use the "best information available" when applying FA, which has been interpreted to mean that they must engage in an "evaluative, comparative" assessment of all the facts available that "may reasonably replace the missing information that an interested party failed to provide";³²⁶ 2) investigating authorities "corroborate information obtained from secondary sources" by confirming the reliability of the information "against other independent sources";³²⁷ and 3) investigating authorities are required "to establish a factual foundation," for "[i]mplicit in the requirement that the best facts available be used is a more fundamental requirement that facts must be used."³²⁸

I. "Best Information Available"

In *Mexico–Rice*, the AB made clear that when using FA, "the facts to be employed are expected to be the 'best information available,'" in accordance with the title of Annex II of the AD Agreement, which reads, "Best Information Available in Terms of Paragraph 8 of Article 6."³²⁹ Although the United States has been reluctant to accept a strict interpretation of the term "best information available," ironically, *Mexico–Rice*, the watershed case on the subject, emerges from a challenge that the United States brought to the Mexican dumping law, which provided that Mexico's investigating authority "shall determine a countervailing duty on the basis of the highest margin of price discrimination or subsidization obtained from the facts available" when it is empowered to do

5.164, 5.178-79, WTO Doc. WT/DS471/AB/R (adopted May 22, 2017) [hereinafter *US–Anti-Dumping Methodologies (China)*] (finding that Commerce's "practice" of using AFA when determining the NME Entity-rate is a norm of "general and prospective application" sufficient to establish an "as such" challenge, though declining to complete the analysis to find a violation of Article 6.8 and Annex II:7).

326. *Mexico–Rice*, *supra* note 282, ¶¶ 294-97.

327. *Korea–Certain Paper*, *supra* note 308, ¶ 7.126.

328. *China–GOES*, *supra* note 284, ¶¶ 7.296, 7.302.

329. *Mexico–Rice*, *supra* note 282, ¶ 287, 289.

so.³³⁰ The Panel, which the AB affirmed, found that because Mexico’s law required the investigating authority to apply the highest margin, it could not possibly allow for “an evaluative, comparative assessment as the term ‘best’ can only be properly applied where an unambiguously superlative status obtains.”³³¹ In other words, as the AB reasoned, an investigating authority must complete two steps: first, it “must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party; second, when applying FA, it must limit itself to those facts “that may reasonably replace the information that an interested party failed to provide.”

Although there was, and to some extent continues to be, some ambiguity as to whether and when the requirement to conduct an “evaluative, comparative assessment” is triggered, in *U.S.–Carbon Steel (India)*, the 2014 “as such” challenge brought by China against the United States’ AFA law discussed above, the AB not only affirmed its finding in *Mexico–Rice* but also refined it.³³² The AB found that, unlike the Mexican AFA law struck down in *Mexico–Rice*, the U.S. law did allow investigating authorities to engage in such an “evaluative, comparative assessment,” which it understood to apply “[w]here there are several ‘facts available’ from which to choose,” but not necessarily “in every instance” in which an investigating authority applies FA.³³³ In other words, there may be cases, the AB hypothesized, where there are not multiple facts available, such as “when there is only one set of reliable information on the record,” in which case the investigating authority would not be required to conduct a comparative evaluation.³³⁴ Although the AB arguably narrowed its prior finding in *Mexico–Rice*, it also modified the Panel’s seeming rejection of India’s proposition that investigating authorities are required to conduct “a comparative

330. *Id.* ¶ 284.

331. *Id.* ¶ 289 (quoting Panel Report, ¶ 7.166).

332. *US–Carbon Steel (India)*, *supra* note 9, ¶¶ 4.433-35. In another decision stemming from a challenge to the United States’ AFA law brought by China and circulated just two weeks later, the AB, though not reaching the merits of China’s claim, once more affirmed the “comparative evaluation” requirement as refined by *US–Carbon Steel (India)*. See Appellate Body Report, *United States–Countervailing Duty Measures on Certain Products from China*, ¶ 2.80, WTO Doc. WT/DS437/AB/R (adopted Jan. 16, 2015) (finding the Panel to have improperly considered China’s “as applied” claims as it was required to under Article 11 of the DSU).

333. *US–Carbon Steel (India)*, *supra* note 9, ¶¶ 4.434-35, 4.468-69, 4.481-82.

334. *Id.* ¶ 4.435.

evaluation of all available evidence with a view to identifying the best information.”³³⁵

Yet, while at the same time affirming *Mexico–Rice*, including its conclusion that FA is to be used “solely for the purpose of replacing information that may be missing, in order to arrive at an accurate . . . determination,”³³⁶ the AB also found that “as part of the process of reasoning and evaluating which ‘facts available’ constitute reasonable replacements, the procedural circumstances in which information is missing, including the non-cooperation of an interested party, may be taken into account.”³³⁷ Unfortunately the AB did not do more to clarify just how an investigating authority may do this other than to assert that “adverse facts that punish would lead to an inaccurate determination and thus not accord with Article 12.7” and that the procedural circumstances alone cannot serve as the basis for FA. As FA, even without an adverse inference, is almost always going to be adverse to a respondent, it is unclear just what the AB meant, and further, just how the AB, in future cases, will endeavor to distinguish between “adverse facts that punish” and those that do not.³³⁸

As to practical limits on investigating authorities when it comes to applying FA, unsurprisingly the “as applied” challenges to investigating authorities’ use of FA are more instructive. Although there have been no recent cases in which the AB or a WTO Panel have explored the “best available information” standard at any depth, notions of the requirement appear early in WTO jurisprudence, such as the Panel report in *Korea–Certain Paper*, in which Indonesia challenged the Korean investigating authority’s selection of facts used to replace a respondent trading company’s missing interest expenses in a dumping investigation.³³⁹ Rather than using the interest expenses of another trading company respondent in the investigation that was not a manufacturer, and thus, had lower interest expenses, the investigating authority used the higher interest expenses of a company that was a manufacturer, and thus had interest expenses that were higher than

335. *Id.* ¶¶ 4.431, 4.435.

336. *Id.* ¶¶ 4.416 (quoting *Mexico–Rice*, WT/DS295/AB/R, para. 293).

337. *Id.* ¶ 4.468.

338. *See id.* Further, it is unclear how the AB is using the term “adverse fact.” Is it using it in the sense that the AB in *US–Hot-Rolled* and the Panel in *China–GOES* interpreted the term, *i.e.* facts that just happen to be adverse to the non-cooperating party, or is it referring the “conscious selection” of facts that would be adverse to respondents, the validity of which the AB in *US–Hot-Rolled* purposely avoided deciding?

339. *Korea–Certain Paper*, *supra* note 308, ¶ 7.108.

those the respondent purported to have.³⁴⁰ Further, the investigating authority had used the other respondent trading company's data to replace the rest of the respondent's selling, general, and administrative, thus rendering the margin all the more anomalous to the respondent's actual commercial situation.³⁴¹ The Panel found that investigating authorities are "normally . . . expected to take into consideration the similarities and dissimilarities between activities carried out by the company for which information is obtained from secondary sources and those of the company whose information is used as a proxy."³⁴² Therefore, while the Panel did not preclude finding that the investigating authority could not use the information from the manufacturer, it did find that, given the dissimilarity, the investigating authority ought to explain its choice.³⁴³

Two years later, after *Mexico–Rice* had been decided, a compliance panel expressed the same frustration with the investigating authorities' continued selection of the manufacturer as a proxy for the trading company respondent's interest expenses, finding that the investigating authorities' mere pointing to the fact that other Indonesian companies had similar interest rates did not "constitute[] the kind of evaluative comparative analysis" envisioned in Annex II:7 as interpreted by the AB in *Mexico–Rice*, particularly when "different sources have been used to replace different elements of [a respondent's] SG&A expenses."³⁴⁴ Because of the few cases on the issue, and given the ambiguity in *U.S.–Carbon Steel (India)*, it is unclear how the AB and WTO panels will apply the "best information available" standard in the future, but what is clear is that clear cherry-picking of facts, especially without reasoned explanation, is likely to be met with scrutiny.

2. Corroboration

In addition to requiring investigating authorities to exercise "special circumspection," Annex II:7 also requires investigating authorities to, "where practicable," corroborate facts selected by "checking the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during

340. *Id.* ¶¶ 7.108-10.

341. *Id.* ¶ 7.111.

342. *Id.* ¶ 7.110.

343. *Id.* ¶ 7.111.

344. Panel Report, *Korea–Anti-Dumping Duties on Imports of Certain Paper from Indonesia: Recourse to Article 21.5 of the DSU by Indonesia*, ¶ 6.54 WTO Doc. WT/DS312/RW (adopted Oct. 22, 2007).

the investigation.” In the words of the Appellate Body, the investigating authority should “ascertain for itself the reliability and accuracy” of the facts available it selects.³⁴⁵

Here, the Panel’s decision in *Korea–Certain Paper* also proves instructive. In *Korea–Certain Paper*, where the Korean investigating authority had taken information from the petition to calculate a respondent’s normal value and export price, Korea made the argument that investigating authorities were not always required to corroborate secondary information derived from a petition if the petition satisfied the requirements of Article 5.3 of the AD Agreement, which stipulates that evidence must be “adequate and accurate” to initiate an investigation.³⁴⁶ The Panel flatly rejected this argument, noting the difference between the “adequate and accurate” standard in Article 5.3 and the requirement to compare secondary information “against that from other independent sources,” the latter of which, according to the Panel, cannot be the same sources, even if official government sources, cited in the petition.³⁴⁷ However, the Panel nonetheless upheld the investigating authorities’ use of FA in its normal value analysis because there, unlike with regard to its export price analysis, the investigating authority submitted an affidavit from an official within Korea’s investigating authority explaining how the petition data had been compared to data provided by other companies.³⁴⁸

Although the corroboration requirement may not be particularly difficult to meet if all an investigating authority has to do is show the information provided is not completely out of line with the data provided by other companies, it is still a requirement to be taken seriously, and does, at least to some degree, provide a check on just how far investigating authorities can venture away from the economic reality of other similarly positioned respondents.

3. “Factual Foundation”

As the Appellate Body has made clear, determinations made on the basis of FA “cannot be made on the basis of non-factual assumptions or speculation.”³⁴⁹ This issue presents itself most frequently in countervailing duty investigations because investigating authorities often conclude that subsidy programs are fully utilized by the non-cooperative

345. *Mexico–Rice*, *supra* note 282, ¶ 289.

346. *Korea–Certain Paper*, *supra* note 308, ¶¶ 7.123-24.

347. *Id.* ¶ 7.124.

348. *Id.* ¶ 7.125.

349. *US–Carbon Steel (India)*, *supra* note 9, ¶ 4.417.

respondent because the investigating authority has been deprived of all the information it requires to determine use and calculate a benefit. However, just as the CIT held in *Trina Solar* the AB and WTO Panels have held that all elements of a subsidy must have some “factual foundation,” *i.e.*, that each element “be clearly substantiated on the basis of positive evidence.”³⁵⁰ Further, as is the case in U.S. law, where FA findings are “at odds with information on the record,” investigating authorities’ use of FA is more subject to question.³⁵¹

The most instructive case on this subject is *China–GOES*, in which China “deduced” that all domestic sales of U.S. respondents AK Steel and ATI were sold to the U.S. government under the auspices of the Buy American Act “at the highest premium,” which was calculated to be a price 25% higher than that of foreign products.³⁵² As a result, the investigating authority calculated a 100% utilization rate for government procurement programs for construction.³⁵³ As China, which argued that it drew “reasonable inferences” from respondents’ information, did not offer a factual foundation for the respondents’ 100% utilization rate of the program other than arguing that there was evidence that respondents “may” have used the program because some of its sales were in the construction sector, the Panel found China to have violated Article 12.7 of the SCM Agreement because “non-cooperation [does not] justify determinations that are devoid of any factual foundation.”³⁵⁴ In the case of AK Steel, of particular importance to the Panel was that, whereas the investigating authority had presumed that all of AK Steel’s subject and non-subject merchandise could have been sold to government construction contractors, AK Steel put its 10-K report and other evidence on the record that demonstrated that, in fact, only 29% of its domestic sales were related to construction.³⁵⁵ Because “an objective and impartial investigating authority” would not have ignored the 10-K report, the Panel found that if the investigating authority had

350. *China–GOES*, *supra* note 284, ¶ 7.302.

351. *Id.* ¶ 7.303.

352. *Id.* ¶¶ 7.299-7.300.

353. *Id.* ¶ 7.297.

354. *Id.* ¶ 7.302. China also asserted in its first written submission that investigating authorities “may draw certain inferences—plainly adverse—from [the] failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-co-operation.” *Id.* ¶ 301 (alteration in original).

355. *Id.* ¶¶ 7.304-309. Other evidence the ignorance of which troubled the Panel included customer lists indicating that they had not sold any GOES equipment to the United State government, which also evidenced that customers had sales outside the construction sector, and an affidavit from the United States that it had not purchased GOES equipment. *Id.* ¶ 7.304.

given the 10-K report proper consideration, it would have applied a utilization rate of less than 100%, thereby finding “no factual basis” for the 100% utilization rate.³⁵⁶ Another Panel in *China–Broiler Products*, involving a dumping case, took a similar position regarding a 105.4% “all-others” FA rate that China had assessed for unknown U.S. respondents, a rate more than twice as high than that assessed for any of the participating respondents, and thereby, “apparently adverse.”³⁵⁷ Citing the Panel’s requirement of a “factual foundation” in *China–GOES* and the lack of “a logical relationship with the facts on the record,” the Panel found that how the rate was determined violated Article 6.8 of the AD Agreement.³⁵⁸ Thus, it is clear from the jurisprudence of the AB and WTO Panels that facts matter—that investigating authorities must base their determinations on facts, and that facts cannot be ignored when contrary to the conclusion that the investigation authority draws.

V. COMMERCE’S “AFA APPROACH” AND THE NEED FOR REFORM

If Commerce is going to continue to apply adverse inferences in dumping and subsidies investigations, it must strike a better balance between the necessity and fairness, *i.e.* between efficiency and process, in terms of both *when* and *how* AFA is applied. The AB eloquently elaborated on this need for balance in *US–Hot-Rolled Steel*, stating that the AD and SCM Agreements should be interpreted as “striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.”³⁵⁹ As a starting matter, inferences that may be adverse to non-cooperative parties are indeed necessary because, as the AB acknowledges and as discussed in Part II.A., there is a need to prevent respondents from unduly delaying investigatory proceedings. As also explained in Part II.A., there is also a need to prevent respondents from abusing the system by not submitting information that would be more adverse to their margin than if Commerce were to merely use the information of cooperative respondents as facts available. However, as discussed in Part II.B, the massive production demand typical in dumping and subsidies investigations, combined with the potential, if not, at times, actual bias of Commerce, an agency which is in an inescapably difficult position because it also responsible for promoting and protecting

356. *Id.* ¶ 7.310.

357. *China–Broiler Products*, *supra* note 305, ¶¶ 7.2891, 7.308.

358. *Id.* ¶¶ 7.311-13.

359. *US–Hot-Rolled Steel*, *supra* note 283, ¶ 86.

the interests of U.S. domestic industry, make dumping and subsidies investigations particularly unique. Because FA, and especially AFA, can so easily be used as a means to reach a particular end-result, *i.e.* to increase margins, it is, therefore, absolutely essential that better procedures are put in place to check against such abuse. Further, consideration must also be made as to whether “AFA” as Commerce understands it is even necessary, and whether FA, in and of itself, may be sufficiently adverse enough to serve the same purpose. This involves a fundamental rethinking of what this Article terms as Commerce’s “AFA approach.”

At the heart of the United States’ AFA law is a false assumption that somehow FA does not involve an adverse inference. This is apparent in the statute itself, which uses the term “inference” only in 19 U.S.C. § 1677e(b), the section of the statute dealing with non-cooperative respondents; the term does not appear in 19 U.S.C. § 1677e(a), which deals with FA and cooperative respondents. The assumption is wrong. Regardless of whether FA or AFA is applied, when Commerce is forced to replace missing or deficient information, Commerce is put in the position where it is forced to use reasoning and evidence to draw a conclusion, *i.e.*, to make an inference. Further, in applying FA, where only the “best information available” is to be used, respondents are still likely to face a result that is less favorable than the result that would have been achieved if an inference had not been made, *i.e.*, a result that is adverse. This is a risk that respondents take when they fail to provide necessary information since—regardless of the respondent’s cooperation—if the information is necessary, Commerce will have to replace it.³⁶⁰

Therefore, the only distinction between FA and AFA is a matter of Commerce’s aim—if AFA is used, Commerce is not, as it does when applying FA, using inferences with the aim of deriving the most accurate replacement for the missing information by using “the best information available”; it is using AFA with the aim of ensuring that the replacement yields a result that is sufficiently adverse enough to deter non-cooperation. While FA allows the possibility of an adverse result, AFA ensures that the missing information will be replaced with information that is certain to yield an adverse result. Commerce reasons that

360. *Egypt–Steel Rebar*, *supra* note 291, ¶ 7.242 (“[E]ven if, with the best possible intentions, an interested party has acted to the very best of its ability in seeking to comply with an investigating authorities’ request for information, that fact, by itself, would not preclude the investigating authority from resorting to facts available in respect of the requested information. This is because an interested party’s level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the only determinant thereof.”) (emphasis in the original).

this is appropriate because it can be assumed that the respondent did not provide the information because it would be adverse to its interests to do so.³⁶¹ AFA, therefore, and as discussed in Part II, ensures that respondents will submit even unfavorable information because, if they do not, the result will surely be worse than that which would be attained using the unfavorable information. This is Commerce's AFA approach.

The question must then be asked if this approach is permissible. U.S. courts and the AB and WTO panels both insist that AFA can only be used if the result is not "punitive," which is troublesome because concepts of deterrence and punishment are inherently entangled.³⁶² Indeed, as deterrence is inextricably linked to punishment, and, in fact, historically and to this day, serves as one of its key functions, the distinction is meaningless.³⁶³ Because the distinction between deterrence and punishment is not one of degree but rather between an end and a means, permitting Commerce to apply AFA so long as it is not punitive is not a judicially administrable standard. More so, if FA is unlawful if its purpose is to punish respondents, then Commerce's AFA approach is unlawful. Commerce's use of FA, on the other hand, is lawful, because while Commerce's application of FA may yield a result that is less favorable than that which would have been rendered if Commerce were able to use the respondent's own data, because Commerce holds itself to the "best information available" standard, its purpose is to arrive at accurate margins, not to punish non-cooperative respondents—*i.e.*, the "effect," not the "intent," of FA is deterrence.

Yet, while the distinction between deterrence and punishment is unworkable as a matter of law, this does not mean that Commerce's AFA approach is undesirable as a matter of policy—punishment is indeed effective in achieving deterrence, and deterrence is, as discussed, particularly necessary when dealing with foreign respondents in dumping and subsidies investigations. The question must then be asked if the possibility of FA is a sufficiently effective deterrent. The answer, this Article posits, is yes. While no empirical study has yet to be performed to demonstrate that the possibility of an investigating authority applying FA, rather than AFA, incentivizes respondents to cooperate, the practical experience of respondents is that when an

361. *US–Hot-Rolled Steel*, *supra* note 283, 29 n.45 (reiterating the United States' oral argument for why adverse inferences are "appropriate").

362. *See, e.g.*, *F. Ili De Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); *US–Carbon Steel (India)*, *supra* note 9, ¶ 4.468.

363. THOMAS HOBBS, *LEVIATHAN* 101 (1904) (arguing that punishment for a crime must be greater than the benefit that comes from committing the crime if the crime is to be deterred).

investigating authority does apply FA, the “best information” it uses still mostly results in a rate that is adverse, *i.e.*, less favorable to the respondent than that which would have been reached using the respondent’s own data.

Even if this is not always true, always using the “best information available” standard is still better than Commerce’s current AFA approach because it provides for a judicially administrable standard. In contrast, the AFA approach is, as discussed, unworkable under the current legal framework, and, as this Article also posits, unworkable under any alternative framework with which WTO Members would be comfortable. This is because meting out punishment is neither a task for which investigating authorities are well-equipped nor one which they are permitted to perform under the current legal architecture, which, as *US–Carbon Steel (India)* articulates, prioritizes accuracy over punishment.³⁶⁴ Further, it is very difficult, if not impossible, for investigating authorities to act according to both aims—to calculate accurate margins and to deter non-cooperation. For instance, under *De Cecco*, which attempted to balance the aims of deterrence and the calculation of accurate margins by requiring that Commerce calculate an AFA rate that is “a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent for non-compliance,” it was unclear how to arrive at an accurate estimate of the respondent’s actual rate and just how much Commerce could add onto that estimate to deter non-compliance.³⁶⁵ The frustration with this task is understandable, because, without all of the necessary data, the first part of the task is very difficult; further, the second part of the task is also difficult, if not impossible, because even with all of the necessary data, investigating authorities are unlikely to ever be sure of just how much of an increase over the estimated actual rate would sufficiently incentivize cooperation.

However, as Commerce is highly unlikely to change its AFA approach, it is still possible to mitigate the unfairness in which it currently results by strengthening procedural protections for respondents as to when and how Commerce may apply AFA. As to *when*, Commerce could, as a preliminary step, lay out clearer requirements for itself as to when deficiency notices are issued so as to better ensure that respondents are on notice that their information is going to be rejected. To this end, Commerce should not free itself of a requirement to issue a

364. *US–Carbon Steel (India)*, *supra* note 9, ¶ 4.468 (“[T]he use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7.”).

365. *De Cecco*, 216 F.3d at 1032 (Fed. Cir. 2000).

deficiency notice simply because one has been issued previously or because it thinks that doing so would be “fruitless,” as discussed in Part III.A.1. Commerce should also be more understanding of respondents who fail to provide information over which they have no control, which, as in *US–Hot-Rolled Steel* and the situations discussed in Part II.A.2, raise profound fairness questions.

One particular area in which Commerce ought to reform is in ensuring that its questionnaires ask respondents to provide information that is truly necessary to the investigation. As discussed in Part III.A.3 and Part IV.A.3, Commerce and other investigating authorities have been given tremendous deference both by U.S. courts and the WTO to determine what information is necessary. However, Commerce, to the extent that it seeks to balance necessity and fairness, ought to ensure that the information it requests from respondents is, indeed, actually necessary. To this end, Commerce’s current practice of applying total AFA when it is denied information it considers necessary rather than FA or partial AFA is particularly worrisome. Where a respondent does not provide Commerce with information because it has a “reasonable belief” that the information is not necessary, Commerce should, rather than applying total AFA, replace respondent’s information with FA if, in fact, it turns out the information of which they have been deprived is actually necessary to calculate a dumping or subsidy margin. For instance, if a respondent fails to provide information about an affiliated company that may have provided it an input in a subsidies investigation, Commerce should apply FA only if, in fact, the affiliated company did provide that input. In this way, respondent companies would still bear responsibility for their non-cooperation, but Commerce would also be prevented from applying AFA when it receives deficient responses to questions the responses to which would have no impact on the margin. This would also protect Commerce from any appearance of asking burdensome, unnecessary questions with the aim to trip up respondents so that AFA can be applied—an increasingly frequent criticism, and sadly one sometimes deserved. Other reforms in this regard might include more specific rules or even guidance as to the questions that Commerce asks, and, at the international level, more standardized questionnaires, which is a reform that some critics of FA have been pressing for a long time.³⁶⁶

As to more procedural protections checking *how* Commerce applies AFA, Commerce could bolster its requirement that AFA rates be corroborated and that they be both reasonable and supported by substantial

366. Andrews, *supra* note 26, at 37.

evidence. With regard to the former, Commerce should, although no longer required by statute, still corroborate rates used from prior segments of the same proceeding.³⁶⁷ Further, though the TPEA clearly frees it of any requirement to do so, Commerce could still, at least in practice, calculate rates that are reasonable estimates of respondents' actual rates, as the TPEA also does not take away from Commerce its discretion to be fairer to respondents in this regard if it so chooses. With regard to the latter, there is hope that the CIT will continue to enforce the standard laid out in *Trina Solar* that determinations take into account all of the evidence on the record and that each element of a subsidy be supported by substantial evidence. Although, as discussed in Part III.B., the evidence required to meet this standard is not high, Commerce could hold itself to a higher standard when it comes to substantiating AFA rates and ensuring that the reasoning it uses when setting such rates is adequately explained; further, there is room for the Federal Circuit and the CIT to give the holding in *Trina Solar* serious bite by requiring more from Commerce before it finds AFA determinations supported by substantial evidence.

Lastly, Commerce and U.S. courts might also endeavor to give meaning to what seems Congress's intent that Commerce take into account the degree of respondents' non-cooperation when applying total AFA. Under the AFA statute as amended by the TPEA, Commerce "may" apply the "highest" rates according to its standard total AFA methodology if it does so "based on [its] evaluation . . . of the situation that resulted in [it] using an adverse inference."³⁶⁸ The plain meaning of this language would indicate that Commerce has to consider the degree of non-cooperation rather than merely treating all non-cooperative respondents alike. So, as makes common moral sense, a respondent the senior management of which has falsified records submitted to Commerce, and then, at verification, destroys evidence of the fraud,³⁶⁹

367. Although the TPEA amendments override the URAA, the URAA, as the SAA articulates, clearly intended Commerce to corroborate these rates since they "concern[] a different time frame than the one at issue." URAA Statement of Administrative Action, *supra* note 31, at 4198.

368. 19 U.S.C. § 1677e(d)(2).

369. In some cases, the non-cooperation of respondents can be astonishing. In one particularly illustrative example, a respondent company that had defrauded Commerce literally hurled documents out a window while physically preventing Commerce's entry into the room that contained proof of the fraud. See Memorandum to the File, through Gene Degnan, Program Manager, Office 8, Antidumping and Countervailing Duty Operations, from Eva Wang, Case Analyst, Office 8, Antidumping and Countervailing Duty Operations, "Placing On Record Verification reports of TMI in the 2007-2008 and 2008-2009 Reviews of the Antidumping Duty Order of Pure Magnesium from the People's Republic of China" (Apr. 24, 2013), at Section XX.

ought to be treated differently than a respondent, like Koehler, discussed in Part III.A., that has done no such act but, under Commerce's standard total AFA approach, would receive the same treatment. While none of the opinions released to date that have applied the amended statute have addressed this point, it is reasonable to assume that Congress, in drafting this language, must have meant it to convey some meaning.

A change to Commerce's AFA approach and the procedures just discussed must come in the form of real, meaningful reform—reform that can emerge on a number of fronts. First, Congress should realize the threat that Commerce's use of AFA has on the United States' trade with the world, for if the United States not only continues to apply AFA but to do so in an increasingly unfair and politically calculated manner, the result is naturally that other countries will follow suit, thereby affecting U.S. exporters. This has already been happening with China, as is evident from the many FA cases brought by the United States against China and discussed in Part IV. But because Congress is currently in the grips of resurgent protectionism and unlikely to pass legislation that could compromise votes, in the absence of congressional action, the only place for change to come is U.S. courts, which ultimately interpret U.S. trade laws.

Even under *Chevron*, the Federal Circuit and the CIT are not powerless. While the Federal Circuit's concern in *Nan Ya* about the harm of grafting procedures onto U.S. trade laws that do give Commerce a great deal of discretion in applying AFA is understandable, it also fails to take into account that it was Congress that implemented the non-self-executing Uruguay Round of WTO Agreements through the URAA, including the AD and SCM Agreements, which did seek to curb investigating authorities' use of FA.³⁷⁰ Of course, while the SAA must be taken as the principal interpretive device for discerning Congress's intent when

370. Though it is far from common, the CIT has at times given considerable weight to WTO law when applying *Chevron*. See *Allegheny Ludlum Corp. v. United States*, 358 F. Supp.2d 1334, 1348 (Ct. Int'l Trade 2005) (“[T]he WTO Appellate Body decisions have persuasive weight here because nonconformance of U.S. practice may result in retaliatory tariffs against U.S. exporters—a result that negates the U.S.’s benefit from the international agreement. Accordingly, were the agency to construe an ambiguous statute so as to benefit domestic interests in violation of international agreements, retaliatory tariffs would result, a penalty which Congress presumably would wish to avoid. Consequently, courts should prefer adhering to international law standards unless otherwise indicated by Congress.”) (citation omitted) (citing *THE FEDERALIST* No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (“It is of high importance to the peace of America that she observe the laws of nations towards [its treaty partners], and to me it appears evident that this will be more perfectly and punctually done by one national government. . . .”).

passing the URAA, Commerce's increased and more aggressive use of AFA has clearly troubled the Federal Circuit and the CIT in recent years, which have, in several instances, remanded determinations to Commerce. Although the passage of the TPEA has to some degree hamstrung efforts by U.S. courts to ensure that foreign respondents are treated fairly in terms of how Commerce applies AFA, the AFA statute, as amended, still allows the Federal Circuit and CIT latitude—and, at least in terms of § 1677e(d)(2), even creates new opportunities—to play this role.

In addition, reform may also happen through the WTO, through AB and WTO Panel decisions that are then implemented in U.S. law and Commerce practice through Section 123 and Section 129 proceedings; or through, if the international political climate ever becomes right, a new or amended WTO agreement further regulating national investigating authorities' behavior in dumping and subsidies proceedings. Although WTO jurisprudence surrounding FA and AFA is still very much developing, to the extent that the AB and WTO Panels provide an additional restraint on Commerce, their role is welcomed by foreign respondents. Further, as the United States' use of AFA, in particular, has been and continues to be, at the center of several of these WTO cases, it is possible that increased scrutiny by the AB and WTO Panels could bring about reform.³⁷¹ There are at the moment three WTO challenges to the United States' use of AFA, the most recent of which includes an “as such” challenge brought this February to the AFA law as amended by the TPEA.³⁷² While “as such” challenges to the AFA statute, even as amended by the TPEA, are likely to fail for the same reason that

371. See VERMULST, *supra* note 28, at 147 (noting the extensive WTO litigation that has resulted under Article 6.8 and Annex II, much of it driven by United States action and Commerce's “drive for perfection”).

372. See Request for Consultations by the Republic of Korea, *United States–Anti-Dumping and Countervailing Measures on Certain Products and the Use of Facts Available*, WTO Doc. WT/DS539/1 (Feb. 14, 2018); *Korea Targets U.S. ‘Leveling the Playing Field Act,’ Use of Adverse Facts*, INSIDE U.S. TRADE (Feb. 20, 2018), <https://insidetrade.com/daily-news/korea-targets-us-%E2%80%98leveling-playing-field-act%E2%80%99-use-adverse-facts>. The other two are *United States–Countervailing Measures on Supercalendered Paper from Canada* and *United States–Countervailing Measures on Cold and Hot-Rolled Steel Products from Brazil*, the former of which is at the panel stage and includes a challenge to the United States' practice of applying AFA when it “discovers” subsidies in countervailing duty investigations that respondents' did not report as “other assistance.” See Request for the Establishment of a Panel by Canada, *United States–Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/2 (Sept. 1, 2016); *At WTO, Canada Takes Aim At U.S. Paper Duties, Adverse Facts, ‘Leveling’ Act*, INSIDE U.S. TRADE (Apr. 14, 2016), <https://insidetrade.com/inside-us-trade/wto-canada-takes-aim-us-paper-duties-adverse-facts-leveling-act>; Request for Consultations by Brazil, *United States–Countervailing Measures on Cold- and Hot-Rolled Steel Flat Products from Brazil*, WTO Doc. WT/DS514/1 (Nov. 11, 2016);

they failed in *US–Hot-Rolled Steel*, *US–Steel Plate*, and, most recently, *US–Carbon Steel (India)* (*i.e.*, the AFA statute does not prevent Commerce, if it so wanted, to comply with WTO law), there is more hope that “as applied” challenges, if properly developed and argued, could succeed.³⁷³ As Commerce increases its use of AFA, far too often appearing to do so solely to inflate dumping and subsidy margins by bludgeoning respondents for the slightest of deficiencies, the United States faces a situation in which other WTO Member states will, in turn, increasingly challenge Commerce’s use of AFA.

Whether through Congress, U.S. courts, the WTO, or through Commerce’s own initiative, reform is necessary. As the United States has always been a leader in establishing international trade rules, and because its actions have profound consequences for the United States and the rest of the world, reform led by the United States cannot come soon enough.

Alex Lawson, *Brazil Sets Sights on US Steel Duties in New WTO Case*, LAW 360 (Nov. 14, 2016), <https://www.law360.com/articles/862084/brazil-sets-sights-on-us-steel-duties-in-new-wto-case>.

373. There is also some hope that “as such” challenges to the AFA law may succeed, especially in light of the AB’s finding in *US–Anti-Dumping Methodologies (China)* that Commerce’s “practice” of applying AFA when establishing the NME Entity rate is a “rule or norm of general and prospective application” capable of being challenged “as such.” See *US–Anti-Dumping Methodologies (China)*, *supra* note 325, ¶¶ 5.150-5.163. However, it is important to note that this challenge related specifically to Commerce’s use of AFA in establishing NME Entity-rates, not AFA in general, and that, unlike in *US–Carbon Steel (India)*, where the United States could point to at least a few concrete cases in which it did not apply its standard AFA approach in subsidies investigations, see Appellate Body Report, *United States–Countervailing Measures on Certain Hot Rolled Carbon Steel Flat Products from India (Carbon Steel (India))*, ¶ 4.418, WTO Doc. WT/DS436/AB/R (adopted Dec. 19, 2014), in *US–Anti-Dumping Methodologies (China)* the United States could not point to a single instance during a period of over twelve years in which it had not applied AFA to determine the NME Entity-rate. See Appellate Body Report, *United States–Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, ¶ 5.160, WTO Doc. WT/DS471/AB/R (adopted May 22, 2017).